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Skinny on the Federal Menu-Labeling Law & Why It Should Survive a First Amendment Challenge

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THE SKINNY ON THE FEDERAL MENU-LABELING LAW & WHY IT SHOULD SURVIVE A FIRST AMENDMENT CHALLENGE

BY DAYNA B. ROYAL*

ABSTRACT

In America's battle of the bulge, the bulge is winning. Contributing to this obesity epidemic is Americans' increasingly widespread practice of eating at restaurants where deceptively fattening food is served to patrons who grossly underestimate the calories in their meals.

To combat this problem and promote public health, Congress enacted a federal menu-labeling law, which requires that restaurants post calorie information next to menu offerings. The constitutionality of this law has yet to be tested in court. But New York City's law, enacted prior, has survived First Amendment scrutiny.

Like New York's menu-labeling law, the federal law should withstand a First Amendment challenge. Though the federal law affects commercial speech, it is a reasonable means for accomplishing a legitimate government interest—the reduction of consumer deception and the promotion of public health. The skinny on the federal menu-labeling law is that it is an appropriate means to inform patrons' menu choices at restaurants and help shrink America's waistline.

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I. INTRODUCTION

Obesity is among the most widespread and burdensome public health issues facing the nation,¹ reaching “epidemic proportions.”²

1. See U.S. Dep't of Health & Human Servs., *The Surgeon General's Call to Action to Prevent and Decrease Overweight and Obesity 2001*, 1 (2001), <http://www.surgeongeneral.gov/topics/obesity/calltoaction/CalltoAction.pdf>.

“[T]here are nearly twice as many overweight children and almost three times as many overweight adolescents as there were in 1980,”³ making Americans “the fattest people in the Western world.”⁴

According to a recent Surgeon General report, “[w]e already are seeing tragic results from these trends.”⁵ Approximately 300,000 deaths a year result from obesity,⁶ which has become a top public-health priority.⁷ “Left unabated, overweight and obesity may soon cause as much preventable disease and death as cigarette smoking.”⁸ “Even moderate weight loss among the overweight (a magnitude of 5 to 10 percent weight reduction) can confer important health benefits.”⁹

Yet “[c]alorie-dense foods are more accessible, more convenient, and more frequently consumed than ever before.”¹⁰ Restaurants serve misleadingly fattening fare with far more calories than similar items prepared at home.¹¹ Consumers are ill-equipped to make health-conscious choices even if they want to.

Studies show that restaurant patrons generally underestimate the caloric content of their food.¹² It is thus no surprise that frequent consumption of restaurant meals is associated with an increased intake of calories, increased weight gain, and increased risk of obesity.¹³

2. *Id.* at XIII.

3. *Id.*

4. MICHAEL FUMENTO, *THE FAT OF THE LAND* 32 (1997).

5. U.S. Dep’t of Health & Human Servs., *supra* note 1, at XIII.

6. *Id.*

7. Jennifer L. Pomeranz, *Compelled Speech Under the Commercial Speech Doctrine: The Case of Menu Label Laws*, 12 J. HEALTH CARE L. & POL’Y 159, 160 (2009); *see also* U.S. Dep’t of Health & Human Servs., *supra* note 1, at XI. For a discussion on how obesity kills and other adverse effects obesity brings, *see* FUMENTO, *supra* note 4, at 10–15.

8. U.S. Dep’t of Health & Human Servs., *supra* note 1, at XIII.

9. FUMENTO, *supra* note 4, at vii–viii. “To determine obesity, the government uses the Body Mass Index (BMI), a formula comparing weight to height.” *Id.* at 27. In exceptional cases (like body builders), BMI may not be accurate, but for the population in general, it is. *Id.*

10. Pomeranz, *supra* note 7, at 161.

11. *See infra* notes 179–90 and accompanying text.

12. *See* Jodi Schuette Green, Note, *Cheeseburger in Paradise? An Analysis of how New York State Restaurant Association v. New York City Board of Health May Reform Our Fast Food Nation*, 59 DEPAUL L. REV. 733, 734 (2010).

13. Pomeranz, *supra* note 7, at 161.

Debate has swirled over menu-labeling laws for years.¹⁴ Advocates argue that menu labeling will encourage consumers to order and consume fewer calories, which will decrease obesity.¹⁵ They also contend that menu labeling “may encourage restaurants to reduce the calories in standard menu items, reduce portion sizes, or offer new healthy alternatives.”¹⁶ And they argue that even if menu labeling alone will not alter behavior, it is an important component of a “broader social movement” to curb obesity and improve public health.¹⁷

Opponents have lobbed many arguments against government-mandated menu labeling.¹⁸ Civil libertarians maintain that “compelled menu labeling to improve individual eating habits amounts to an unwarranted and paternalistic government intrusion into private decision-making and interferes with the free market.”¹⁹ Others argue that mandatory menu labeling places undue financial burden on restaurants because they will need to spend money complying with the law and because they will lose revenue normally generated from less healthy offerings.²⁰

14. See, e.g., Paul Frumkin, *Revised NYC Menu-Labeling Law Reignites Fierce Debate*, NATION'S RESTAURANT NEWS (Feb. 3, 2008), <http://www.nrn.com/article/revised-nyc-menu-labeling-law-reignites-fierce-debate> (discussing various menu-labeling laws and the controversy surrounding them); Paul Frumkin, *Industry, Watchdogs Prepare to Battle Over Dueling Menu-Labeling Mandates*, NATION'S RESTAURANT NEWS (Dec. 7, 2008), <http://www.nrn.com/article/industry-watchdogs-prepare-battle-over-dueling-menu-labeling-mandates> (describing menu-labeling as “controversial” and discussing debate surrounding it); Meg Marco, *Judge Tosses NYC Menu Labeling Regulation*, THE CONSUMERIST (Sept. 11, 2007, 6:09 PM), <http://consumerist.com/2007/09/judge-tosses-nyc-menu-labeling-regulation.html> (discussing controversy surrounding New York's menu-labeling effort and menu labeling in general).

15. See Michelle Banker, *I Saw the Sign: The New Federal Menu-Labeling Law and Lessons from Local Experience*, 65 FOOD & DRUG L.J. 901, 915 (2010).

16. *Id.* at 917.

17. *Id.*

18. See *id.* at 917–20.

19. *Id.* at 919. Richard Posner has suggested menu-labeling laws may be considered “anticompetitive because requiring all restaurants to disclose nutrition information eliminates the competitive edge of those restaurants, such as Subway, that use voluntary provision of nutrition information as a marketing point for attracting health-conscious consumers.” *Id.* at 920.

20. See *id.* at 918. But see *id.* at 914–15 (noting that some data has suggested that the restaurant industry will not lose revenue from menu labeling, though there

Until recently, federal law did not require that restaurants post calorie information for their menu offerings.²¹ This changed on March 23, 2010,²² when Congress enacted wide-sweeping and controversial healthcare legislation.²³ Found within this lengthy law is the federal government's first successful attempt at requiring that restaurants post calorie counts on their menus.²⁴

may be revenue shifting "from chains offering primarily high-calorie items to restaurants with more low-calorie options").

21. See 21 U.S.C. § 343(q)(5)(A)(i) (2006) (exempting restaurants from labeling requirements), *amended by* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §4205, 124 Stat. 119 (2010) ("Healthcare Act").

22. See Patient Protection and Affordable Care Act, § 4205, 124 Stat. 119.

23. See *id.* The United States District Court for the Eastern District of Virginia recently held a provision of this Act, not relevant here, unconstitutional. See *Va. ex rel. Cuccinelli v. Sebelius*, 728 F. Supp.2d 768 (E.D. Va. 2010), *vacated*, Nos. 11-1057, 11-1058, 2011 WL 3925617 (4th Cir. Sept. 8, 2011) (holding that the "Minimum Essential Coverage Provision exceeds the Commerce Clause powers vested in Congress under Article I" and severing the offending provision). The United States District Court for the Northern District of Florida also held a provision of this Act unconstitutional, but it concluded it could not be severed and thus the entire Act could not survive. See, *Fla. ex rel. Bondi v. U.S. Dep't Health and Human Servs.*, 708 F.Supp. 2d 1256, 1298–99, 1305 (N.D. Fla. 2011), *aff'd in part, rev'd in part, sub nom Fla. ex rel. Attorney Gen. v. U.S. Dep't Health and Human Servs.*, 648 F.3d 1235 (11th Cir. 2011).

24. See Patient Protection and Affordable Care Act § 4205(b), 124 Stat. at 573–76 (to be codified as amended at 21 U.S.C. § 343(q)(5)). Prior federal attempts to implement similar mandatory disclosure requirements failed. See Green, *supra* note 12, at 740–45 (tracing the federal government's failed attempts to impose mandatory calorie-disclosure laws for restaurants).

In 1990, the Federal Food, Drug, and Cosmetic Act ("FDCA") was amended by the Nutrition Labeling and Education Act ("NLEA"). See *Wellife Products v. Shalala*, 52 F.3d 357, 358 (D.C. Cir. 1995) (*per curiam*). The NLEA, codified at 21 U.S.C. § 343 *et seq.*, reformed the FDCA in the following ways:

- (1) [I]t required nutrition labeling for nearly all food products under the authority of the FDA, with exemptions for small businesses, restaurants, and some other retail establishments;
- (2) it changed the requirements for ingredient labels on food packages;
- (3) it imposed and regulated health claims on packages;
- (4) it standardized all nutrient content claims; and
- (5) it standardized serving sizes.

Holk v. Snapple Beverage Corp., 575 F.3d 329, 332 (3d Cir. 2009).

After the NLEA, the FDCA expressly excluded restaurants from complying with labeling requirements. See 21 U.S.C. § 343(q)(5)(A)(i). The Healthcare Act

A similar mandatory calorie-disclosure law New York City implemented has met with harsh opposition and litigation.²⁵ A restaurant association representing over 7,000 restaurants challenged the law and argued, among other things, that it violated restaurant owners' First Amendment rights.²⁶ The Second Circuit rejected this claim, holding that though the regulation impacted protected commercial speech, it survived scrutiny.²⁷

While New York's calorie-posting law was tested in court and upheld,²⁸ the question remains whether the federal law will receive similar treatment. This article maintains that it should.

Part II analyzes New York's law and the Second Circuit's analysis in *New York State Restaurant Ass'n v. New York City Board of Health*²⁹ to provide a model for analyzing the federal law. Part III evaluates this model as the appropriate test to determine whether the federal law should survive First Amendment scrutiny, under the same standard the Second Circuit applied from *Zauderer v. Office of Disciplinary Counsel*.³⁰ Finally, Part IV applies this test and concludes that the federal law survives such scrutiny.

II. NEW YORK'S ORDINANCE PROVIDES A MODEL

In January 2008, New York City enacted an ordinance very similar to the recently enacted federal menu-labeling law.³¹ By doing so,

changed this. See Patient Protection and Affordable Care Act § 4205(b), 124 Stat. at 573. One member of Congress described a similar but unsuccessful predecessor bill to the Healthcare Act as closing a "loophole" created by NLEA's restaurant exemption. See Banker, *supra* note 15, at 904.

25. See *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114, 117 (2d Cir. 2009).

26. See *id.* at 117, 131.

27. See *id.* at 131–36.

28. See *id.*

29. 556 F.3d 114.

30. 471 U.S. 626, 651–53 (1985).

31. See NEW YORK CITY, N.Y., tit. 24, § 81.50 (2008). Before enacting this ordinance, the city had enacted a slightly different ordinance that it repealed and modified after a district court found that federal law preempted the first version. See *N.Y. State Rest. Ass'n*, 556 F.3d at 120–21 (2d Cir. 2009). Prior to the federal menu-labeling law, the Second Circuit found the current version of New York's law not

New York became the first city to require calorie postings on restaurant menus.³²

This ordinance was soon tested in court.³³ The U.S. District Court for the Southern District of New York and, on appeal, the U.S. Court of Appeals for the Second Circuit entertained a First Amendment challenge to this law, and it survived.³⁴ Given the similarity of the two laws, New York's law may provide a model for analyzing the federal law.

A. New York City's Ordinance: Section 81.50

New York City Ordinance 81.50 requires that certain food service establishments in the city (those included in groups of 15 or more that operate nationally and either do business under the same name, operate under common ownership, or are franchises) must display calorie content on their menus and menu boards.³⁵ The ordinance affects approximately ten percent of all restaurants in the city.³⁶

preempted. *See id.* at 117 (holding ordinance survives both a preemption and First Amendment challenge).

32. Allison Auldridge, *New Health Care Bill Requires Restaurants to Display Calorie Counts*, URBAN FOOD POLICY (Mar. 29, 2010), http://www.urbanfoodpolicy.com/2010_03_01_archive.html. New York's ordinance was "followed by similar citywide regulations in Connecticut, California and Washington [S]tate." *Id.* For more information on state and local laws covering nutrition labeling in restaurants, *see* NUTRITION LABELING IN CHAIN RESTAURANTS: STATE AND LOCAL LAWS/BILLS/REGULATIONS: 2009–2010, CENTER FOR SCIENCE IN THE PUBLIC INTEREST, http://www.cspinet.org/new/pdf/ml_bill_summaries_09.pdf. Time will tell whether these laws will withstand constitutional scrutiny.

33. *See N.Y. State Rest. Ass'n*, 556 F.3d 114 (examining the constitutionality of this ordinance).

34. *See id.* at 117, 122.

35. tit. 24, § 81.50 (a), (c). Some may argue that this law is underinclusive because it fails to cover many restaurants serving fattening food because, for example, they have only one location. But a law need not tackle all issues in an attempt to ameliorate some. If a legislature decides to improve public health by requiring that chain restaurants post calories, it can do this without taking the broader step of requiring that all restaurants post calories. *See infra* notes 97–99, 299–303 and accompanying text.

36. *See N.Y. State Rest. Ass'n*, 556 F.3d at 117. Some may argue that a law affecting only ten percent of restaurants is underinclusive. But this is not a problem. *See supra* note 35, *infra* notes 97–99, 299–303 and accompanying text.

The New York State Restaurant Association (“Association”), representing over 7,000 restaurants, challenged this ordinance claiming that it violated restaurants’ First Amendment rights by compelling commercial speech.³⁷ Both the Southern District of New York and the Second Circuit, affirming the district court, disagreed.³⁸

The appeals court first identified the speech as commercial because it “proposes a commercial transaction.”³⁹ According to the court, because Section 81.50 “requires disclosure of calorie information in connection with a proposed commercial transaction—the sale of a restaurant meal,” it applies to commercial speech.⁴⁰

Though commercial speech receives First Amendment protection, the court acknowledged, it is less than the protection afforded noncommercial speech, and the level of protection for commercial speech depends on the type of commercial speech at issue.⁴¹ Relying on Supreme Court precedent, the Second Circuit explained that a crucial difference exists between purely factual disclosure requirements and restrictions on commercial speech.⁴² Per the court, the former receive more lenient rational-basis review while the latter receive more rigorous scrutiny.⁴³ The court treated the ordinance as a factual-disclosure requirement and held that it survived the relaxed level of scrutiny.⁴⁴

B. The Analogous Federal Law

The federal menu-labeling law is similar to New York’s and should receive similar treatment.⁴⁵ The federal law requires that restaurants and other retail food establishments with 20 or more locations

37. *See N.Y. State Rest. Ass’n*, 556 F.3d at 117–18, 131.

38. *Id.* at 117, 136.

39. *See id.* at 131 (citing *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985)).

40. *See id.* (quoting *N.Y. State Rest. Ass’n v. N.Y. City Bd. of Health*, No. 08-CIV-1000(RJH), 2008 WL 1752455, at *6 (S.D.N.Y. Apr. 16, 2008)).

41. *Id.* at 131–32 (citing *Zauderer*, 471 U.S. at 637).

42. *Id.* at 132.

43. *See id.*

44. *See id.* at 131–34.

45. *Compare* NEW YORK CITY, N.Y., tit. 24, § 81.50 (2008) with Patient Protection and Affordable Care Act, Pub. L. No. 111-148 § 4205(b), 124 Stat. 119, 573–76 (2010) (to be codified and amended at 21 U.S.C. § 343(q)(5)).

disclose the number of calories in food items offered for sale.⁴⁶ Restaurants must prominently display calorie information on their menus and menu boards.⁴⁷

The federal law contains an additional provision. It requires that menus and menu boards display a succinct “statement concerning [the] suggested daily caloric intake,” as specified by regulation “to enable the public to understand, in the context of a total daily diet, the significance of the caloric information that is provided.”⁴⁸

Despite this additional provision, the Second Circuit’s treatment of New York’s law provides a useful guide.⁴⁹ As the Second Circuit recognized, *Zauderer* should provide the framework for analyzing the legitimacy of a menu-labeling law. Accordingly, the federal law should survive such scrutiny.

46. Patient Protection and Affordable Care Act § 4205(b), 124 Stat. at 573–74. Like New York City’s law, the federal law only applies to restaurants with a certain number of locations, and some may contend that the law is underinclusive. As with New York’s law, however, this should not pose a problem. *See supra* note 35–36, *infra* notes 97–99, 299–303 and accompanying text.

47. Patient Protection and Affordable Care Act § 4205(b), 124 Stat. at 573–74. The FDA’s proposed rule states that “[c]overed establishments are required to post calories and other information on menus and menu boards” and defines “menus” and “menu boards” as “the primary writing of the restaurant . . . from which a consumer makes an order selection.” Food labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments; Proposed Rule, 76 Fed. Reg. 66, 19,192, 19, 201 (proposed April 6, 2011) (to be codified at 21 C.F.R. pts. 11 and 101).

48. Patient Protection and Affordable Care Act § 4205(b), 124 Stat. at 573–74. This provision creates additional issues. *See infra* note 217.

49. Like the provision requiring posting of calories, the provision requiring posting the recommended daily caloric intake is reasonably related to the government’s legitimate objective of dispelling consumer deception by providing consumers with information to make healthy choices in an effort to curb obesity and improve public health. *See infra* Part IV. Informing consumers about the appropriate daily caloric intake is important because it provides context to calorie content of specific menu items and thus enables consumers to understand the significance of ordering a 1,000 calorie lunch. *See supra* note 47 and accompanying text. Because this additional provision provides information necessary to effectuate the law’s purpose, it furthers the law’s objective and thus should also survive *Zauderer*. *See infra* Part IV and note 217.

III. ZAUDERER'S LENIENT STANDARD SHOULD APPLY

Though the federal law burdens commercial speech, it mandates factual disclosures and does not restrict speech or compel opinions or viewpoints. *Zauderer's* lenient review should thus apply.⁵⁰

A. *The Law Involves Commercial Speech*

The First Amendment⁵¹ protects various types of speech, including commercial speech.⁵² Defining commercial speech can be tricky. Although speech that proposes a commercial transaction quintessentially constitutes commercial speech,⁵³ a combination of other factors may also suggest speech is commercial.⁵⁴ Citing the Supreme Court, the Tenth Circuit has explained, "speech may properly be characterized as commercial speech where, among other things, (1) it is concededly an advertisement, (2) it refers to a specific product, or (3) it is motivated by an economic interest in selling the product."⁵⁵

50. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985); see also *infra* Part III.D.

51. The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. 1.

52. *Zauderer*, 471 U.S. at 637 (noting that "[t]here is no longer any room to doubt that what has come to be known as 'commercial speech' is entitled to the protection of the First Amendment"). Commercial speech was not always entitled to First Amendment protection. See *U.S. Healthcare, Inc. v. Blue Cross*, 898 F.2d 914, 931 n.20 (3d Cir. 1990). Until 1975, it was considered "devoid of First Amendment significance." *Id.*; see also *Curtis v. Thompson*, 840 F.2d 1291, 1297 (7th Cir. 1988) (observing that the Supreme Court first began giving commercial speech First Amendment protection in 1975).

53. *Zauderer*, 471 U.S. at 637; see also *Bd. of Trustees v. Fox*, 492 U.S. 469, 473–74 (1989) (noting that the test for whether speech is commercial is whether it proposes a commercial transaction).

54. See *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66–67 (1983) (citation omitted).

55. *United States v. Wenger*, 427 F.3d 840, 847 (10th Cir. 2005) (citing *Bolger*, 463 U.S. at 66–67); see also *United States v. Bell*, 414 F.3d 474, 479 (3d Cir. 2005).

Speech on menus and menu boards should satisfy this definition. Menus and menu boards are vehicles through which restaurants propose a commercial transaction—the purchase of food. Such speech offers food products for specific prices.⁵⁶ To assist consumers in deciding whether to

56. The fact that calorie-content speech on menus and menu boards arguably touches on an important public issue, obesity, does not render the speech noncommercial. *Cf. Bd. of Trustees*, 492 U.S. at 475 (citing Supreme Court cases that support the notion that speech can raise public issues while still remaining commercial speech). The Court's "lodestars in deciding what level of scrutiny to apply to a compelled statement must be the nature of the speech taken as a whole and the effect of the compelled statement thereon." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796 (1988). As the Supreme Court has noted:

Riley involved a state-law requirement that in conducting fundraising for charitable organizations (which [the Court has] held to be fully protected speech) professional fundraisers must insert in their presentations a statement setting forth the percentage of charitable contributions collected during the previous 12 months that were actually turned over to charities (instead of retained as commissions).

Bd. of Trustees, 492 U.S. at 474.

In response to the government's argument that the compelled statement involved merely commercial speech, the *Riley* Court responded that even assuming, *arguendo*, that were true, such speech was inextricably intertwined with fully protected speech, charitable solicitation. *Riley*, 487 U.S. at 796; *see also Bd. of Trustees*, 492 U.S. at 474. The reason charitable solicitation is fully protected is because it involves many speech interests, including the propagation of views and ideas and the advocacy of causes. *Ill. ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600, 611–12 (2003). The *Riley* Court considered the compelled speech "inextricably intertwined" with the protected charitable solicitation because the government required that such speech accompany the charitable solicitation. *See Bd. of Trustees*, 492 U.S. at 474. The Court explained that the speech should be considered on the whole to determine its classification. *See Riley*, 487 U.S. at 796; *see also Bd. of Trustees*, 492 U.S. at 474. Here, unlike in *Riley*, the speech on the whole concerns a commercial transaction, the sale of food. Menus and menu boards contain information to that end. They advertise products available for sale and inform the public about those products, including their cost. They do not contain speech disseminating views and ideas nor advocating causes. In *Riley*, the overall background speech was fully protected with the compelled statement arguably commercial. *See Riley*, 487 U.S. at 796; *see also Bd. of Trustees*, 492 U.S. at 474. Here, the overall background speech is commercial with the mandatory disclosure (calorie content in context of daily caloric total) also commercial. An argument that calorie information should be fully protected is weak. Calorie counts in the context of daily calorie totals are just like the other speech on menus: they provide

accept such offers, and which offers to accept, menus and menu boards contain relevant information about the products offered for sale, including price and basic ingredients. Speech that proposes a commercial transaction is the essence of commercial speech,⁵⁷ and menus and menu boards propose such transactions.

Menus and menu boards also satisfy other factors characteristic of commercial speech. They are, in a sense, advertisements, which refer to specific products, and they are motivated primarily by an economic interest to sell products.⁵⁸ An advertisement is defined as a paid announcement of a good for sale.⁵⁹ Menus and menu boards should satisfy this definition. Restaurants fund menus and menu boards to announce goods and facilitate sales. Menus and menu boards refer to the specific products offered, and their existence is motivated by restaurants' interest in selling their goods. If restaurants did not advertise the products with the necessary information (price, ingredients, size, etc.), then the public would not know whether to accept the offer and purchase the product. Because speech on menus and menu boards satisfies the definition of commercial speech, the federal law regulating menus involves commercial speech.⁶⁰ The next question is what test applies to determine the validity of such a law affecting commercial speech.

B. Two Tests for Commercial Speech: Central Hudson vs. Zauderer

Two relevant tests have emerged to determine whether government regulation of commercial speech survives First Amendment

information to enable consumers to purchase products. Calorie information is not itself commentary on the obesity epidemic that should be entitled to heightened First Amendment protection. Given the overall context of menus and menu boards, which is to sell food, speech contained therein, including calorie information, should be classified as commercial speech.

57. See *Bd. of Trustees*, 492 U.S. at 473–74.

58. Cf. *Wenger*, 427 F.3d at 847 (citing *Bolger*, 463 U.S. at 66–67) (describing *Bolger*'s three-part test for determining whether certain speech qualifies as commercial speech).

59. See RANDOM HOUSE, WEBSTER'S UNABRIDGED DICTIONARY 29 (2d ed. 1993).

60. See *Pomeranz*, *supra* note 7, at 189.

scrutiny.⁶¹ The first test, set forth in *Central Hudson Gas & Electric Corp. v. Public Services Commission*⁶², most appropriately applies when a law restricts commercial speech.⁶³ But where, as here, a law instead compels disclosure of purely factual information, *Zauderer's* more lenient test should apply.⁶⁴

1. *Central Hudson*

In *Central Hudson Gas and Electric Corp.*, the Supreme Court considered whether a regulation that banned promotional advertising violated the First Amendment.⁶⁵ It concluded that it did.⁶⁶

According to the test the Court fashioned, if commercial speech is neither misleading nor related to unlawful activity, the government

61. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) (providing one test); *Central Hudson Gas & Elec. Corp. v. Public Servs. Comm'n*, 447 U.S. 557, 564 (1980) (providing other).

62. 447 U.S. 557.

63. See *Id.* at 564; see also Pomeranz, *supra* note 7, at 170.

64. See *Zauderer*, 471 U.S. at 651; see also Pomeranz, *supra* note 7, at 173–74. This is far from unequivocal. See discussion *infra* notes 119–23 and accompanying text; see also *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1143 (D.C. Cir. 2009) (suggesting that any time commercial speech is at issue, the Supreme Court requires a substantial government interest and narrow tailoring—requirements found in *Central Hudson*, not *Zauderer*). The D.C. Circuit's conclusion that the Supreme Court always requires showing a substantial government interest and narrow tailoring (essentially, requiring satisfying *Central Hudson's* requirements) is incorrect. In reaching its conclusion, the D.C. Circuit cites a Supreme Court case that does not stand for this proposition. See *id.* (citing *Bd. of Trustees v. Fox*, 492 U.S. 469, 480 (1989)). In *Board of Trustees*, the regulation restricted speech (compared to requiring a disclosure), and the Court applied *Central Hudson*. See *Bd. of Trustees*, 492 U.S. at 471–72, 475. The *Board of Trustees* Court did not consider which test applies to factual disclosures. See generally *id.* at 471–86.

The Tenth Circuit addressed the issue in *United States v. Wenger*, and it provided yet another framework for analyzing the interaction of *Central Hudson* and *Zauderer*. See 427 F.3d 840, 849 (10th Cir. 2005); see also *infra* note 163 (discussing this framework).

Where a law instead compels disclosure of opinions and viewpoints, rather than purely factual information, more rigorous scrutiny applies. See *infra* Part III.C.

65. *Central Hudson*, 447 U.S. at 558.

66. *Id.* at 571–72.

must assert a substantial interest justifying a *restriction* on the speech.⁶⁷ The restriction must directly advance the stated interest, and if the interest could be served equally well by a less restrictive means, the restriction may not survive.⁶⁸ The party seeking to uphold the restriction bears the burden to justify it.⁶⁹

Settled principles aid in determining whether this test is satisfied. First, regarding the state-interest prong, a court may not supplant the government's stated interests with other suppositions.⁷⁰

Second, the burden that the regulation directly advance the stated interest "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction

67. *Id.* at 566.

68. *Id.* Despite this language, *Central Hudson* does not impose a least-restrictive-means requirement. *See Bd. of Trustees*, 492 U.S. at 476–77.

69. *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 142 n.7 (1994). "The Supreme Court has variously described the *Central Hudson* test as having three or four prongs, depending on whether the preliminary inquiry into whether the content to be regulated is protected is counted as a prong." *Alexander v. Cahill*, 598 F.3d 79, 88 n.5 (2d Cir. 2010); *see also Central Hudson*, 447 U.S. at 564–72 (describing test as four prong and applying the test); *Fla. Bar v. Went for It, Inc.*, 515 U.S. 618, 624 (1995) (describing test as three prong). Here, the threshold inquiry into whether the speech is misleading or unlawful and not protected at all is considered preliminary to *Central Hudson*'s three-prong test. *See Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 165 (5th Cir. 2007) (treating inquiry of whether speech is false or misleading as a threshold, which if answered negatively leads to applying *Central Hudson* scrutiny); *United States v. Wenger*, 427 F.3d 840, 848–49 (10th Cir. 2005) (setting forth *Central Hudson* as a three-prong test, which does not include the preliminary question of whether the speech is misleading); *cf. Alexander*, 598 F.3d at 89 (noting that government may freely regulate and even ban speech that is misleading or concerns unlawful activity, but where speech falls into neither category, it may only regulate commercial speech by satisfying *Central Hudson*'s remaining three prongs); *id.* at 90 (concluding first that the commercial speech is not misleading or unlawful and therefore falls within the zone of protected commercial speech before applying *Central Hudson*'s three prongs). *But see id.* at 88 n.5 (deciding to adopt four-part locution of the *Central Hudson* test throughout the case since issue was the threshold question of whether speech was entitled to First Amendment protection); *Borgner v. Brooks*, 284 F.3d 1204, 1210 (11th Cir. 2002) (describing *Central Hudson* as a "four-step process").

70. *Fla. Bar*, 515 U.S. at 624 (1995) (citing *Edenfield v. Fane*, 507 U.S. 761, 768 (1993)).

will in fact alleviate them to a material degree.”⁷¹ The record should contain at least some evidence substantiating the allegations of harm.⁷²

Third, in applying the final prong of *Central Hudson*, the Court examines the fit between the state’s interest and the means it chooses to serve those interests.⁷³ The means chosen need not be the least restrictive⁷⁴ but must reasonably fit with the government’s ends.⁷⁵ In other words, the regulation must be narrowly tailored to achieve the government’s objectives.⁷⁶ “[T]he existence of ‘numerous and obvious less-burdensome alternatives to the restriction on commercial speech... is certainly a relevant consideration in determining whether the fit between ends and means is reasonable.’”⁷⁷ But the regulation need not provide “the single best disposition.”⁷⁸

2. *Zauderer*

The Supreme Court set forth the second test in *Zauderer v. Office of Disciplinary Counsel*.⁷⁹ There the Court considered “whether a State may seek to prevent potential deception of the public by requiring attorneys to disclose in their advertising certain information regarding fee arrangements.”⁸⁰

71. *Id.* at 626 (quoting *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995)).

72. *See id.* This evidentiary requirement is not onerous. *See id.* at 628–29 (quoting *Burson v. Freeman*, 504 U.S. 191, 211 (1992)) (explaining that the Court has permitted speech restrictions “by reference to studies and anecdotes pertaining to different locales altogether,” or even “based solely on history, consensus, and ‘simple common sense’”).

73. *Id.* at 632.

74. *See Bd. of Trustees v. Fox*, 492 U.S. 469, 476–78 (1989) (explaining that despite language in *Central Hudson* suggesting that this prong imposes a least-restrictive-means requirement, it requires only narrow tailoring).

75. *Fla. Bar*, 515 U.S. at 632.

76. *See id.*

77. *Id.* (quoting *Cincinnati v. Discovery Network Inc.*, 507 U.S. 410, 417 n.13 (1993)).

78. *Id.* This is not equivalent to rational basis review. *Id.*

79. 471 U.S. 626, 651 (1985).

80. *Id.* at 629.

Zauderer was an attorney who had advertised his services such that if a client did not recover, she would owe “no legal fees.”⁸¹ The State Office of Disciplinary Counsel filed a complaint charging “that the ad’s failure to inform clients that they would be liable for costs (as opposed to legal fees) even if their claims were unsuccessful rendered the advertisement ‘deceptive’ in violation of [Ohio Disciplinary Rule].”⁸² Both parties agreed that, other than the omission regarding the fee arrangement, the ad “was not false, fraudulent, misleading, or deceptive.”⁸³

Zauderer argued that the Court should essentially apply *Central Hudson* to determine whether a disciplinary rule mandating a factual disclosure survives scrutiny.⁸⁴ The Court rejected *Central Hudson* in this case, relying on broad language regarding the important differences between factual-disclosure requirements and restrictions on speech.⁸⁵

Emphasizing that Zauderer “overlooks material differences between disclosure requirements and outright prohibitions on speech,”⁸⁶ the Court distinguished between prohibitions on speech and factual-disclosure requirements and explained that the State had not prevented attorneys from stating anything but had simply required that they provide more information than they otherwise would have.⁸⁷

According to the Court, factual-disclosure requirements are entitled to lenient scrutiny, unlike restrictions on speech or laws compelling opinions or viewpoints, which receive more-rigorous review.⁸⁸ In distinguishing between restrictions on speech and factual disclosures, the Court explained that “[b]ecause the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides,” a

81. *Id.* at 629–31.

82. *Id.* at 633.

83. *Id.* at 633–34.

84. *See id.* at 650 (noting appellant argued that the Court should apply the same test to the factual-disclosure requirement as it applied to the restrictions on speech, essentially the *Central Hudson* test).

85. *See id.*

86. *Id.*

87. *Id.*

88. *See id.* at 650–51.

commercial speaker's interest in not providing particular factual information is minimal.⁸⁹

Factual-disclosure requirements thus tread much more narrowly on First Amendment rights than do prohibitions.⁹⁰ Therefore, as *Zauderer* explained, commercial speakers' rights are "adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers."⁹¹

Because *Zauderer* framed its test in terms of the government interest at stake in that case, preventing consumer deception,⁹² some have maintained *Zauderer's* scrutiny is limited to laws targeting consumer deception, as opposed to laws targeting other government interests.⁹³ But this interpretation ignores the *Zauderer* Court's repeated emphasis on the importance of factual disclosures, in general, to provide the public with information, and the minimal interest commercial speakers have to withhold this information.⁹⁴

Zauderer rejected the argument that factual-disclosure requirements are subject to a least-restrictive-means analysis.⁹⁵ Accordingly, the Court will not strike a factual-disclosure requirement simply because other less restrictive means exist to achieve the same result.⁹⁶

The Court also rejected the contention that "a [factual-] disclosure requirement is subject to attack if it is 'under-inclusive'" and

89. *Id.* at 651.

90. *Id.*

91. *Id.*

92. *See id.*

93. *See, e.g.,* United States v. Philip Morris, 566 F.3d 1095, 1144–45 (D.C. Cir. 2009) (suggesting that for disclosure requirements to be constitutional under *Zauderer* they must be limited to purely factual and uncontroversial information geared towards thwarting efforts to mislead consumers or capitalize on prior deceptions); Video Software Dealers Ass'n v. Schwarzenegger, 556 F.3d 950, 966 (9th Cir. 2009) (categorizing *Zauderer's* standard as "the factual information and deception prevention" standard (emphasis added)); Allstate Ins. Co. v. Abbott, 495 F.3d 151, 166 (5th Cir. 2007) (finding that unlike *Zauderer*, the case at issue involves minimal potential for customer confusion and therefore, *Central Hudson* applies).

94. *See supra* notes 84–90 and accompanying text.

95. *Zauderer*, 471 U.S. at 651 n.14.

96. *Id.*

fails to address all aspects of the problem it intends to ameliorate.⁹⁷ “As a general matter, governments are entitled to attack problems piecemeal, save where their policies implicate rights so fundamental that strict scrutiny must be applied. The right of a commercial speaker not to divulge accurate information regarding his services is not such a fundamental right.”⁹⁸ Thus, a factual-disclosure requirement, like the federal menu-labeling law, should not be considered fatally under-inclusive for targeting only part of the problem—in this case, only those restaurants with 20 or more locations.⁹⁹

Zauderer also distinguished factual-disclosure requirements in the commercial-speech context from compelled speech regarding politics, religion, or other matters of opinion where the government forces citizens “to confess by word or act their faith therein.”¹⁰⁰ Where the latter is concerned, much more rigorous scrutiny applies.¹⁰¹

Zauderer thus presents a dichotomy. Factual-disclosure requirements, which create less First Amendment concerns, receive more lenient treatment than do prohibitions on speech or laws compelling speakers to espouse certain messages with which they disagree.

C. Post-Zauderer Cases Maintain Distinction for Factual Disclosures

Cases following *Zauderer* have maintained the distinction between factual-disclosure requirements, on one hand, and prohibitions on speech and laws compelling espousal of opinions or viewpoints, on the other. As the Supreme Court reaffirmed after *Zauderer*, “a zeal to protect the public from ‘too much information’ [can] not withstand First Amendment scrutiny.”¹⁰² But where Congress simply requires disclosure to better enable the public to make informed choices, and it does not

97. *Id.*

98. *Id.* (citation omitted).

99. See *infra* notes 299–303 and accompanying text.

100. *Zauderer*, 471 U.S. at 651 (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

101. See *id.*; see also *Pharm. Care Mgmt. Ass’n v. Rowe*, 429 F.3d 294, 309 (1st Cir. 2005).

102. *Meese v. Keene*, 481 U.S. 465, 482 (1987) (citing *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976)).

prohibit giving additional information, Congress carries out the interests embodied in the First Amendment.¹⁰³

As the Court again explained in a different case involving a federal law that compelled disclosure, “[b]y compelling some disclosure of information and permitting more, the Act’s approach recognizes that the best remedy for misleading or inaccurate speech contained within materials subject to the Act is fair, truthful, and accurate speech.”¹⁰⁴ In other words, where a law simply requires a commercial speaker to provide some truthful information, the speaker may combat this law not by attacking the compulsion of truthful information but by providing more truthful information that supports the speaker’s position.¹⁰⁵

Courts have also maintained the distinction set forth in *Zauderer* for factual disclosures as opposed to compelled speech, which involves subjective, non-factual information, like opinions and viewpoints.¹⁰⁶

103. *See id.* at 480–81.

104. *Id.* at 481.

105. *See id.* at 480–81.

106. *See, e.g.,* Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n, 475 U.S. 1, 15 n.12 (1986) (distinguishing compelling purely factual disclosures from compelling disclosure of the messages of third parties and noting that the government “has substantial leeway in determining appropriate information disclosure requirements for business corporations”); N.Y. State Rest. Ass’n v. N.Y. City Bd. of Health, 556 F.3d 114, 134 (2d Cir. 2009) (identifying relevant inquiry as whether calorie-count requirement involves forced disclosure of purely factual information or whether it involves compelled speech of a non-factual nature); Entm’t Software Ass’n v. Blagojevich, 469 F.3d 641, 651–52 (7th Cir. 2006) (explaining that the relevant question is whether the labeling and signage requirements involve purely factual disclosures or compelled speech of a subjective, controversial, and opinion-oriented nature); Env’tl. Def. Ctr., Inc. v. EPA, 344 F.3d 832, 848–51 (9th Cir. 2003) (finding that requiring municipalities to engage in speech that educates and informs the public is a permissible required disclosure and not compelled speech because it does not compel the dissemination of an ideological message); *see also* Pomeranz, *supra* note 7, at 181–82 (maintaining that courts treat compulsion of facts and beliefs differently, and “[t]he rationale for treating statements of fact and those of belief differently underlies basic principles of the First Amendment”). *But see* Hurley v. Irish-Am. Gay, Lesbian, and Bisexual Grp. of Boston, Inc., 515 U.S. 557, 573 (1995) (acknowledging fact/viewpoint distinction in the commercial-speech context, but noting that outside that context, the government may not compel expressions of value, opinion, endorsement, or “statements of fact the speaker would rather avoid”) (emphasis added); Int’l Dairy Foods Ass’n v. Amestoy, 92 F.3d 67, 71 (2d Cir.

Where a labeling requirement mandates posting highly subjective opinion-based information, it will be treated differently than where a label requires providing objective facts, such as the “surgeon general’s warning of the carcinogenic properties of cigarettes.”¹⁰⁷

“Particularly in the commercial arena, the Constitution permits the State to require speakers to express certain messages without their consent, the most prominent examples being warning and nutritional information labels.”¹⁰⁸ This approach makes sense. Compelling disclosure of purely factual information does not force a commercial speaker to espouse or otherwise take responsibility for views she does not actually hold, and thus it raises less First Amendment concerns.¹⁰⁹ Indeed, mandating factual disclosures “furthers, rather than hinders, the First Amendment goal of the discovery of truth and contributes to the efficiency of the ‘marketplace of ideas.’”¹¹⁰ For this reason, requirements mandating disclosure of purely factual information should receive less scrutiny than requirements mandating disclosure of opinions and viewpoints.¹¹¹

The Ninth Circuit echoed this understanding and applied *Zauderer* beyond the attorney advertising context in *Environmental Defense Center, Inc. v. EPA*.¹¹² There the court held that a law compelling municipalities to distribute educational materials about the impacts of storm-water discharge on water bodies and the steps the public should take to reduce pollutants in that water did not violate the First Amendment.¹¹³ Analogizing to *Zauderer*, the court explained that requiring “appropriate educational and public information activities” is

1996) (noting that right not to speak “inheres in political and commercial speech alike” and “extends to statements of fact as well as statements of opinion”).

107. See *Entm’t Software Ass’n*, 469 F.3d at 652. One commentator has utilized an “Anti-Tobacco Paradigm” to address tackling obesity. See FUMENTO, *supra* note 4, at 264–67.

108. *Entm’t Software Ass’n*, 469 F.3d at 651 (citing Nat’l Elec. Mfrs. Ass’n v. Sorrell, 272 F.3d 104, 114–16 (2d Cir. 2001)).

109. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).

110. *N.Y. State Rest. Ass’n*, 556 F.3d at 132 (quoting *Sorrell*, 272 F.3d at 113–14).

111. See *Zauderer*, 471 U.S. at 651.

112. 344 F.3d 832, 848–51 (9th Cir. 2003).

113. See *id.* at 848–49.

not the same as compelling dissemination of an ideological message.¹¹⁴ Though the latter may run afoul of the First Amendment, the former does not.¹¹⁵ This is especially so where a law neither prohibits speakers from adding their own views nor prohibits them from stating that federal law required them to provide the information.¹¹⁶ *Environmental Defense Center* thus confirms that a more lenient test applies to factual-disclosure laws, as compared to laws compelling opinions or viewpoints or restricting commercial speech.¹¹⁷

Zauderer and its progeny reveal that courts treat laws differently depending on whether they (1) require purely factual disclosures; (2) compel the expression of ideas, opinions, or viewpoints; or (3) restrict speech. Laws that simply require the disclosure of purely factual information should receive *Zauderer*'s lenient scrutiny while laws that compel expression of ideas, opinions, or viewpoints, or that restrict speech face tougher scrutiny.

D. Zauderer Should Apply

The above framework suggests that *Zauderer*'s lenient test for factual-disclosure requirements should apply to the federal menu-labeling law since it requires the disclosure of factual information, namely calorie information on food offered for sale.¹¹⁸ But the analysis is not that simple.

It is not clear that *Zauderer* applies where the government interest is something other than preventing consumer deception.¹¹⁹ In the

114. *See id.* at 849–50.

115. *See id.* at 848–51.

116. *See id.* at 850.

117. *Id.* at 848–51; *see also* *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985); *Clear Channel Outdoor, Inc. v. New York*, 594 F.3d 94, 112 n.16 (2d Cir. 2010) (noting that review is more lenient where law simply requires disclosure of factual information as compared to restricting speech).

118. *See supra* notes 46–49 and accompanying text.

119. *See Zauderer*, 471 U.S. at 651. Some have limited *Zauderer* to laws targeting consumer deception. *See, e.g.,* *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457, 491 (1997) (Souter, J., dissenting) (“*Zauderer* carries no authority for a mandate unrelated to the interest in avoiding misleading or incomplete commercial messages.”); Charles R. Yates, III, Note, *Trimming the Fat: A Study of Mandatory Nutritional Disclosure Laws & Excessive Judicial Deference*, 67 WASH. & LEE L.

case of the federal menu-labeling law, it is questionable whether the government interest involves preventing consumer deception.¹²⁰ Because of the murkiness of the government's interest in enacting this law, some might persuasively argue that *Zauderer* should not apply here.

According to this argument, where the government targets something other than consumer deception, like obesity,¹²¹ *Central Hudson*, not *Zauderer*, applies even if the law requires a factual disclosure.¹²² But as explained below, even though the case law is inconclusive, *Zauderer* should apply to factual-disclosure requirements even if the government interest is not strictly preventing consumer deception.

And even if *Zauderer* applies only to factual-disclosure requirements aimed at preventing consumer deception, it should still apply to the federal menu-labeling law because shining a light on deceptively fattening food is intertwined with curbing obesity.¹²³ Thus, *Zauderer* should apply to the menu-labeling law simply because it is a factual-disclosure requirement. But even if *Zauderer* is limited solely to factual-disclosure requirements targeting consumer deception, the menu-labeling law should satisfy these requirements.

REV. 787, 812–13 (2010) (maintaining that *Zauderer* is limited to preventing consumer deception and is therefore inapplicable where a law mandates disclosure of calorie counts); *cf. also* Int'l Dairy Foods Ass'n v. Boggs, 622 F.3d 628, 641–42 (6th Cir. 2010) (interpreting *Zauderer* and its progeny and suggesting that *Zauderer* applies only to inherently and potentially misleading speech but also suggesting that the critical distinction is really whether law imposes a disclosure requirement or restricts speech); Borgner v. Brooks, 284 F.3d 1204, 1210 (11th Cir. 2002) (applying *Central Hudson* not *Zauderer* to disclosure requirements where speech is only potentially, not inherently misleading); *infra* notes 132–62 and accompanying text (discussing Supreme Court cases suggesting *Zauderer* might be limited to laws aimed at targeting consumer deception).

120. *But see infra* Part III.D.2.

121. *But see infra* Part III.D.2. (arguing that the government interest of combating obesity is intertwined with preventing consumer deception).

122. *But see* Yates, III, *supra* note 119, at 812–13, 819–23 (contending that though *Central Hudson* is a better test than *Zauderer* for a menu-labeling law, neither *Zauderer* nor *Central Hudson* provides a perfect fit and fashioning a different test).

123. Admittedly, the deception here is different from the deception in *Zauderer* as discussed further below. *See infra* Part III.D.2.

1. *Zauderer* Should Apply Because the Law is a Factual-Disclosure Requirement

The government's interest should not dictate whether *Zauderer* or *Central Hudson* applies. The better criterion is the nature of the law at issue. Where a law mandates a factual disclosure, as is the case here, *Zauderer* should apply.¹²⁴

Some courts have followed this rule and broadly applied *Zauderer* to laws requiring factual-disclosures.¹²⁵ For example, in *New*

124. See, e.g., *Conn. Bar Ass'n v. United States*, 620 F.3d 81, 93 (2d Cir. 2010). Where it restricts or prohibits speech, *Central Hudson* should apply. Cf. *Glickman*, 521 U.S. at 474 (holding it was error for lower court to apply *Central Hudson* to test a law compelling the funding of commercial speech given that *Central Hudson* involved a restriction on speech). Admittedly, doctrinal uncertainties have emerged regarding whether disclosure requirements implicate First Amendment interests to a lesser degree than restrictions on speech such that the former should receive lesser scrutiny on that basis. See *Conn. Bar Ass'n*, 620 F.3d at 93 n.15 (quoting *Bad Frog Brewery, Inc. v. N.Y. State Liquor Auth.*, 134 F.3d 87, 94 (2d Cir. 1998)).

125. See, e.g., *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114, 133 (2d Cir. 2009) (noting that “*Zauderer*’s holding was broad enough to encompass *nonmisleading* disclosure requirements”) (emphasis added) (citing *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 115 (2d Cir. 2001)); see also *Pharm. Care Mgmt. Ass’n v. Rowe*, 429 F.3d 294, 310 n.8 (1st Cir. 2005) (Toruella, J., concurring) (explaining that the court found no cases limiting *Zauderer*’s holding to potentially deceptive advertising aimed at consumers); *United States v. Bell*, 414 F.3d 474, 484–85 (3d Cir. 2005) (citing *Zauderer* and noting that the government may impose reasonable regulations to prevent consumer deception, and likewise “mandatory disclosure of factual, commercial information does not offend the First Amendment”) (citations omitted); *SEC v. Wall St. Publ’g Institute, Inc.*, 851 F.2d 365, 373–74 (D.C. Cir. 1988) (citing *Zauderer* and noting that “disclosure requirements have been upheld in regulation of commercial speech even when the government has not shown that “absent the required disclosure, [the speech would be false or deceptive]”); cf. *Env’tl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 848–51 (9th Cir. 2003) (analogizing to *Zauderer* and finding that requiring municipalities to engage in speech educating the public about the impacts of storm-water discharge and about the hazards of improper waste disposal is a proper required disclosure under the First Amendment and does not qualify as compelled speech). But see *Pharm. Care Mgmt.*, 429 F.3d at 316 (including state interest of preventing deception to consumers as part of *Zauderer*’s test and suggesting state interest did, concern preventing deception to consumers); *Yates, III*, *supra* note 119, at 812–13

York State Restaurant Ass'n, the Second Circuit explained that “*Zauderer’s* holding [is] broad enough to encompass nonmisleading disclosure requirements.”¹²⁶ Thus, even where the government’s interest is merely preventing obesity, the Second Circuit found that *Zauderer* applies.¹²⁷

The Ninth Circuit similarly expanded *Zauderer’s* reach when it applied it to a regulation mandating that municipalities distribute materials informing the public about the impacts of storm-water discharge on national waterbodies and the steps the community can take to reduce pollutants in storm-water runoff.¹²⁸ The court did not require consumer deception as a prerequisite to applying *Zauderer*.¹²⁹

Though some have applied *Zauderer* broadly beyond disclosure requirements targeting consumer deception,¹³⁰ at least two Supreme

(maintaining that *Zauderer* is limited to preventing consumer deception and is inapplicable where a law mandates disclosure of calorie counts).

126. 556 F.3d at 133 (citing *Sorrell*, 272 F.3d at 115).

127. *See id.* at 133–34. *But cf.* *Int’l Dairy Foods Ass’n v. Amestoy*, 92 F.3d 67, 74 (2d Cir.1996) (holding that consumer curiosity alone is not sufficient state interest to compel disclosure of factual, commercial speech, but preventing consumer deception would be under *Zauderer*). Despite the holding in *Amestoy*, the Second Circuit explained in *Sorrell* that commercial-disclosure requirements are subject to less scrutiny than restrictions on commercial speech, and it cited *Zauderer* as the appropriate test for disclosure requirements. *See Sorrell*, 272 F.3d at 113–14. In applying *Zauderer*, the court explained that the state’s interest in protecting human health and the environment was sufficient to satisfy *Zauderer*, and it expressly recognized that the required disclosure did not target consumer deception or confusion. *See id.* at 115. Rather, it aimed, by requiring labeling, to better inform consumers about the products they purchase, and this is acceptable under *Zauderer*. *See id.* The court distinguished *Amestoy* because in that case the state interest was solely consumer curiosity, and consumer health was not at stake, but in *Sorrell*, it was. *Id.* at 115 n.6. The Second Circuit reaffirmed this distinction in *New York State Restaurant Ass’n*, explaining that combating obesity is sufficient reason to apply *Zauderer* rather than *Central Hudson*. *See N.Y. State Rest. Ass’n*, 556 F.3d at 132–33.

128. *Cf. Envtl. Def. Ctr.*, 344 F.3d at 849–51 (distinguishing cases like *Wooley v. Maynard*, 430 U.S. 705, 713 (1977), where regulation requires that municipalities distribute information educating public about the impacts of storm-water discharge and the hazards of improper waste disposal).

129. *See id.* at 848–50.

130. *See N.Y. State Rest. Ass’n*, 556 F.3d at 133; *Envtl. Def. Ctr.*, 344 F.3d at 848–50; *see also supra* note 125.

Court cases suggest that a narrower reading of *Zauderer* is appropriate.¹³¹ While *Zauderer* may apply only where consumer deception is at issue, such a narrow interpretation is unnecessary.

In *United States v. United Foods, Inc.*,¹³² the Supreme Court held that compelled subsidies for advertising violated the First Amendment.¹³³ In doing so, the Court maintained that its decision was not inconsistent with *Zauderer*.¹³⁴ Distinguishing *Zauderer*, the Court explained that there was no suggestion in *United Foods* “that the mandatory assessments imposed to require one group of private persons to pay for speech by others [we]re somehow necessary to make voluntary advertisements nonmisleading for consumers,” as was the case in *Zauderer*.¹³⁵ In distinguishing *Zauderer* in this fashion, the Court suggests *Zauderer* may be limited strictly to preventing consumer deception.

As the Second Circuit recognized in *New York Restaurant Ass’n*, however, this language need not be taken so far.¹³⁶ *United Foods* involved a compelled subsidy, not a mandatory disclosure,¹³⁷ and is thus distinguishable from the federal menu-labeling law here.¹³⁸ Though the

131. See *infra* notes 132–55 and accompanying text.

132. 533 U.S. 405 (2001).

133. *Id.* at 415–16.

134. *Id.*

135. *Id.* at 416.

136. See *N.Y. State Rest. Ass’n v. N.Y. City Bd. Of Health*, 556 F.3d 114, 133 (2d Cir. 2009).

137. See *United Foods*, 533 U.S. at 408–09.

138. Though restaurants may have to expend funds to comply with the menu-labeling law (to print new menus, compile calorie information, etc.), the law is not a compelled subsidy of speech. See *infra* Part III.E.2. The Court distinguishes between compelled speech and compelled subsidy. See *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 557, 564–65 n.8 (2005). In a compelled-subsidy case, the government compels someone to subsidize someone else’s private speech. See *id.* at 557, 565 n.8. In a compelled-speech case, the government compels someone personally to espouse a message. See *id.* Because the menu-labeling law does not compel restaurants to fund the private speech of another, the compelled-subsidy cases are inapposite. Cf. *id.* (holding that because a beef checkoff funded the Government’s own speech, it was not susceptible to a First Amendment compelled-subsidy challenge). One may argue that the menu-labeling law compels restaurants to fund government speech by forcing them to expend money to provide calorie information, which in a sense is the government’s message. Cf. *id.* at 559–67 (“Citizens may challenge compelled support of private speech, but have no First Amendment right not to fund government speech.”). But the compelled *funding* of government speech does not

United Foods Court did not emphasize this point when it distinguished *Zauderer*,¹³⁹ this renders the law here different from the law in *United Foods* and thus renders *United Foods* not expressly controlling.¹⁴⁰

In the above language from *United Foods*, the Court emphasized that *Zauderer* involved a different situation, but it did not hold that *Zauderer* is limited only to that situation.¹⁴¹ Rather, the Court rebuffed the suggestion that *Zauderer* was inconsistent because *Zauderer* involved preventing consumer deception, and no one had suggested that *United Foods* did.¹⁴² *United Foods* did not, however, foreclose extending *Zauderer* to cover government interests beyond preventing deception¹⁴³ (as the Second Circuit did in *New York Restaurant Ass'n*).¹⁴⁴

Yet another Supreme Court case, *Milavetz, Gallop & Milavetz P.A. v. United States*,¹⁴⁵ suggests, while not squarely holding, that *Zauderer* may be limited to laws aimed at preventing consumer deception. But it too does not necessitate this conclusion.

create a First Amendment problem. *See id.* at 562. Furthermore, as this paper maintains, the menu-labeling law does not compel espousal of a message. *See infra* Part III.E.1. It simply requires a factual disclosure.

139. *See United Foods*, 533 U.S. at 416.

140. Commentator Jennifer Pomeranz maintains that *United Foods* together with a case that predated it, *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), actually supports the position that the government can require disclosure of commercial speech for reasons other than avoidance of deception. *See Pomeranz, supra* note 7, at 180–81. This is because, according to Pomeranz, *United Foods* expressly upheld *Glickman*, which did not depend on avoidance of deception for its factual-speech mandate. *See id.* at 180–81. Yet the *Glickman* Court rejected *Central Hudson's* rigorous review and subjected the subsidy to less rigorous review before upholding it. *See Glickman*, 521 U.S. at 467–70, 472, 474 (explaining that it was error for lower court to apply *Central Hudson's* rigorous scrutiny to test constitutionality of monetary assessments for generic, factually accurate advertising). Pomeranz's analysis of *Glickman* in the wake of *United Foods* supports the argument that compelled factual disclosures need not face tough scrutiny where such disclosures serve a government interest other than preventing deception. *But see infra* note 225.

141. *See United Foods*, 533 U.S. at 416.

142. *See id.*

143. *See id.*; *see also* *N.Y. State Rest. Ass'n v. N.Y. Bd. of Health*, 556 F.3d 114, 133 (2d Cir. 2009).

144. *See N.Y. State Rest. Ass'n*, 556 F.3d at 133.

145. ___ U.S. ___, 130 S. Ct. 1324 (2010).

In *Milavetz*, the Supreme Court considered whether mandatory disclosure requirements in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 violated the First Amendment.¹⁴⁶ The Court upheld the disclosure requirements, finding no First Amendment violation.¹⁴⁷ In deciding whether *Zauderer* or *Central Hudson* provided the proper test, the Court explained that *Central Hudson* applies to non-misleading commercial speech, and it agreed with the government's position that the disclosures at issue targeted misleading speech.¹⁴⁸ "For that reason, and because the challenged provisions impose a disclosure requirement rather than an affirmative limitation on speech, the Government contends that the less exacting scrutiny described in *Zauderer* governs [the Court's] review."¹⁴⁹ The Court agreed.¹⁵⁰

In other words, the Court clarified that where a regulation both targets misleading commercial speech and imposes a disclosure requirement, *Zauderer* applies.¹⁵¹ The Court underscored that the

146. See *id.* at ___, 130 S. Ct. at 1329 (2010).

147. See *id.*

148. *Id.* at ___, 130 S. Ct. at 1339.

149. *Id.* (emphasis added).

150. *Id.*

151. See *id.* Yet another Supreme Court case seems to have followed this paradigm. See *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 146–47 (1994). In *Ibanez*, the Court analyzed the action as a speech restriction, and it applied *Central Hudson*. See *id.* at 142–43. When, however, the Court addressed the alternative argument that a disclaimer was minimally required to render the speech not misleading, the Court cited *Zauderer*. See *id.* at 146. This suggests that the Court believes *Zauderer* provides the appropriate standard where there is a mandatory disclosure aimed at preventing consumer deception. But see *Mason v. Fla. Bar*, 208 F.3d 952, 958 (11th Cir. 2000) (citing *Ibanez* to support conclusion that partial restrictions on speech when combined with a required disclaimer must be supported by some "identifiable harm," and a lack of such harm fails to satisfy *Central Hudson*). In *Mason*, though the Eleventh Circuit also cites *Zauderer*, it appears to think *Central Hudson* is the proper test where a disclosure is at issue because the court finds that the mandatory disclosure violates *Central Hudson*. See *id.* In *Mason*, the Florida Bar cited three interests as supporting its regulations, two of which did not involve consumer deception, and it did so in the context of a *Central Hudson* analysis. See *id.* at 955–56. It thus seems that the Eleventh Circuit believes *Central Hudson* applies even where a mandatory disclosure is involved and the government interest is not consumer deception. See *id.* at 955–58. The *Mason* court never directly considered, however, the specific question of whether *Zauderer* or *Central Hudson* applies to mandatory disclosure laws aimed at government interests other

challenged provisions shared the features of the rule in *Zauderer*, which meant *Zauderer* clearly controlled.¹⁵² It did not, however, decide whether *Zauderer* applies where a law does not necessarily target deceptive commercial speech but still imposes a disclosure requirement.¹⁵³ *Milavetz* therefore does not dictate whether *Zauderer* would not also apply in that situation.¹⁵⁴ Accordingly, *Milavetz* should not clearly limit *Zauderer* to laws targeting only consumer deception.¹⁵⁵

than consumer deception, though it appears to assume *Central Hudson* applies. *See id.* at 956–58.

152. *See Milavetz*, ___ U.S. at ___, 130 S. Ct. at 1340; *see also* *Conn. Bar Ass’n v. U.S.*, 620 F.3d 81, 95–96 (2d Cir. 2010) (following *Milavetz* and doing similarly in similar situation). In *Connecticut Bar Ass’n*, the court, interpreting *Milavetz*, suggests that the critical determining factor for when to apply *Zauderer* is whether the law at issue suppresses speech or compels a factual disclosure. *See Conn. Bar Ass’n*, 620 F.3d at 96 (explaining that Second Circuit precedent points to the same conclusion as *Milavetz* and citing precedent emphasizing that *Zauderer* applies to mandatory disclosures while *Central Hudson* applies to speech restrictions); *see also id.* at 98 n.18 (emphasizing the distinction between mandatory disclosures and suppression of speech).

153. *See Milavetz*, ___ U.S. at ___, 130 S. Ct. at 1339. *But see id.* at ___, 130 S. Ct. at 1344 (Thomas, J., concurring) (“[A] disclosure requirement passes constitutional muster [under *Zauderer*] only to the extent that it is aimed at advertisements that, by their nature,” are “*inherently likely* to deceive or . . . [have] *in fact* been deceptive.”). Justice Thomas questions the very premise of *Zauderer*, “that, in the commercial-speech context, ‘the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed[.]’” *Id.* at ___, 130 S. Ct. at 1343 (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 652 n.14 (1985)). Indeed, Thomas “would be willing to reexamine *Zauderer* and its progeny in an appropriate case to determine whether these precedents provide sufficient First Amendment protection against government-mandated disclosures.” *See id.* at ___, 130 S. Ct. at 1343. This is not the first time a Justice has expressed discontent with the distinction between restrictions on commercial speech and mandatory disclosures. *See, e.g., Conn. Bar Ass’n*, 620 F.3d at 93 n.15 (noting Justice Brennan’s opinion in *Zauderer* where he maintained that *Central Hudson* should apply to regulation of commercial speech whether outright suppression or mandatory disclosure).

154. *But see infra* note 155.

155. At least one court has declined to read *Milavetz* narrowly, though it appears to have construed *Milavetz* as limiting *Zauderer* to misleading speech. *See Int’l Dairy Foods Ass’n v. Boggs*, 622 F.3d 628, 640–42 (6th Cir. 2010) (explaining that *Milavetz* established that *Zauderer* applies where a disclosure requirement targets speech that is “*inherently*” misleading and extending *Zauderer* to cover disclosure requirements targeting speech that is only potentially misleading).

After *Milavetz* explained why the rule in *Zauderer* was analogous, it distinguished a different case, *In re R.M.J.*,¹⁵⁶ in which the Court applied *Central Hudson*.¹⁵⁷ The Court's treatment of *In re R.M.J.* might also suggest a narrow interpretation for *Zauderer*, but this too is unnecessary. As *Milavetz* noted, because the rules at issue in *In re R.M.J.* prohibited attorneys from advertising certain things, and the commercial speech at issue was not inherently misleading, *Central Hudson* applied.¹⁵⁸

The *Milavetz* Court's distinction of *In re R.M.J.* is no more dispositive here than the Court's analogizing to *Zauderer*. It provides essentially the same information. Where a law both restricts speech and does not target misleading speech, *Central Hudson* applies.¹⁵⁹ This still does not dictate which test applies if only one of these conditions is satisfied, i.e., where a law does not restrict speech but instead compels a factual disclosure (*Zauderer*), and where the law is not necessarily directed at misleading speech¹⁶⁰ (*Central Hudson*).¹⁶¹ Thus, *Milavetz* does not undermine the position that *Zauderer*, not *Central Hudson*,

There is language in *Milavetz* suggesting the Court may have intended to limit *Zauderer* to disclosure requirements aimed at combating misleading speech. See *Milavetz*, ___ U.S. at ___, 130 S. Ct. at 1339–40. For instance, the Court states that the challenged provisions share the “essential” features of the rule at issue in *Zauderer*, one of which being that the law targets consumer deception. See *id.* at ___, 130 S. Ct. at 1340. It is not entirely clear, however, whether the Court uses this term to mean the relevant features or the requisite features (i.e., both features must exist for *Zauderer* to apply).

156. 455 U.S. 191 (1982).

157. *Milavetz*, ___ U.S. at ___, 130 S. Ct. at 1340.

158. See *id.*; see also *In re R. M. J.*, 455 U.S. at 203–07 (invalidating three restrictions upon an attorney's First Amendment rights because the speech within his advertisement was not inherently misleading).

159. See *Milavetz*, ___ U.S. at ___, 130 S. Ct. at 1340.

160. This assumes that the menu-labeling law does not aim to prevent consumer deception, a point discussed and disputed in Parts III.D.2. and IV.B.

161. See *Milavetz*, ___ U.S. at ___, 130 S. Ct. at 1339–40. Of course the Court in *In re R. M. J.* could not have even considered applying *Zauderer* as *Zauderer* was not decided until three years later. Compare *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) (decided in 1985), with *In re R. M. J.*, 455 U.S. 191 (decided in 1982).

applies to test the validity of a menu-labeling law.¹⁶² This position remains viable.¹⁶³

Bolstering this position is language from yet another Supreme Court case. In *44 Liquormart, Inc. v. Rhode Island*,¹⁶⁴ a case with fractured opinions, three Justices supported the position that the decisive factor for deciding which test to apply is whether a law restricts speech or compels a factual disclosure.¹⁶⁵ According to those Justices, “[w]hen a

162. See *N. Y. State Rest. Ass’n v. N.Y. York City Bd. of Health*, 556 F.3d 114, 132–33 (2d Cir. 2009).

163. See *id.* But see *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 164–68 (5th Cir. 2007) (applying *Central Hudson* where the potential for consumer confusion is minimal, and the provisions at issue both restrict and compel commercial speech); *United States v. Wenger*, 427 F.3d 840, 849 (10th Cir. 2005); *Int’l Dairy Foods Ass’n v. Amestoy*, 92 F.3d 67, 69–70, 72–73 (2d Cir. 1996) (applying *Central Hudson* where law compels, as opposed to restricts, commercial speech). In *New York State Restaurant Ass’n*, the Second Circuit distinguished *International Dairy Foods Ass’n* because that case “‘was expressly limited to cases in which a state disclosure requirement is supported by no interest other than the gratification of consumer curiosity.’” *N.Y. State Rest. Ass’n*, 556 F.3d at 134 (quoting *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 115 n.6 (2d Cir.2001)). New York’s menu-labeling law, however, was enacted to prevent obesity, and this rendered *International Dairy Foods Ass’n*, and its application of *Central Hudson* to a law compelling (rather than restricting) speech, inapplicable. See *id.* at 132, 134.

In *Wenger*, the court had an interesting way of resolving the question of how *Zauderer* and *Central Hudson* interact. It explained that in the context of disclosure requirements, *Zauderer* eases the burden of satisfying *Central Hudson* because it “presumes that the government’s interest in preventing consumer deception is substantial, and that where a regulation requires disclosure only of factual and uncontroversial information and is not unduly burdensome, it is narrowly tailored.” *Wenger*, 427 F.3d at 849. In other words, according to this court, where a disclosure requirement is involved, *Zauderer* does not provide an additional test but rather supplies some of the elements of the *Central Hudson* test. This seems to be a stretch, however, given that *Zauderer* instructs that where it applies, the government need only show its disclosure requirements satisfy its reasonable relationship rule. See *Zauderer*, 471 U.S. at 651. Further, because *Zauderer* post-dates *Central Hudson*, if the Supreme Court intended *Zauderer* simply to provide the elements for *Central Hudson*, it could have stated this, yet it did not. See *id.* Indeed, *Zauderer* expressly rejected the argument that *Central Hudson*’s standard applied to test the validity of the factual-disclosure requirement. See *id.* at 650–51.

164. 517 U.S. 484 (1996).

165. See *id.* at 501 (Stevens, Kennedy, Ginsburg, JJ., concurring) (plurality opinion).

State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, *or requires the disclosure of beneficial consumer information*, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review.”¹⁶⁶ On the other hand, when a state prohibits the dissemination of non-misleading commercial messages, “there is far less reason to depart from the rigorous review that the First Amendment generally demands.”¹⁶⁷ Because the advertising ban in *44 Liquormart* constituted a “blanket prohibition against truthful, non-misleading speech about a lawful product,” and it “serve[d] an end unrelated to consumer protection,” the Justices reviewed it with “special care,” and applied *Central Hudson*.¹⁶⁸

This approach is also supported by *Zauderer*.¹⁶⁹ As the Court noted there, extending First Amendment protection to commercial speech “is justified principally by the value to consumers of the information such speech provides.”¹⁷⁰ Providing more information to consumers is why commercial speech receives First Amendment protection in the first place. A commercial speaker’s interest in *not* providing information is minimal.¹⁷¹ Because this interest is minimal and thus easily overcome, the government should not have to satisfy the more stringent *Central Hudson* standard but instead should only have to satisfy

166. *Id.* (emphasis added).

167. *Id.*

168. *Id.* at 504 (quoting *Central Hudson Gas & Elec. Corp. v. Public Servs. Comm’n*, 447 U.S. 557, 566 n.9 (1980)).

169. See *N.Y. State Rest. Ass’n v. N.Y. City Bd. of Health*, 556 F.3d 114, 133 n.22 (2d Cir. 2009) (“[T]he First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed”) (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 n.14 (1985)). *New York State Restaurant Ass’n* also reasoned that *Zauderer* is broad enough to encompass factual-disclosure requirements irrespective of whether the government interest is preventing consumer deception. See *id.* at 133 n.21.

170. *Zauderer*, 471 U.S. at 651 (citing *Va. Pharm. Bd. v. Va. Citizens Consumer Council, Inc.* 425 U.S. 748 (1976)).

171. *Id.*

the more lenient *Zauderer* standard¹⁷² where a factual disclosure is at issue.

Thus, though not without question, *Zauderer* should apply to factual disclosures even if the government interest is not preventing consumer deception. A better inquiry to determine whether *Central Hudson* or *Zauderer* applies is whether the regulation restricts commercial speech or compels a factual disclosure.

2. The Government Interest is Intertwined with Preventing Deception

Assuming, however, *Zauderer* should only apply where the government interest is preventing consumer deception, it should still apply to the menu-labeling law at issue here. This is because preventing consumer deception is intertwined with preventing obesity.¹⁷³

At the outset, it should be stated that any deception involved in menu listings is different from the deception in *Zauderer*. In *Zauderer*, the deception stemmed from an affirmative statement contained within an attorney's advertisement.¹⁷⁴ The advertisement provided some information, namely that if clients did not recover, they would owe "no legal fees,"¹⁷⁵ yet it did not state that if they did not recover, they would still be liable for costs (as compared to fees).¹⁷⁶

The advertisement made no mention of the distinction between "legal fees" and "costs," and to a layman not aware of the meaning of these terms of art, the advertisement would suggest that employing appellant would be a no-lose proposition in that his representation in a losing cause would come entirely free of charge.¹⁷⁷

This rendered the advertisement "deceptive" in violation of an Ohio Disciplinary Rule.¹⁷⁸

Specific menus of course vary, but generally, menus provide food for sale with corresponding prices. Menus often also provide

172. *See id.*

173. *See also infra* Part IV.B.

174. *See Zauderer*, 471 U.S. at 631, 633–34.

175. *Id.* at 631.

176. *Id.* at 631, 633.

177. *Id.* at 652.

178. *Id.* at 633–34.

descriptions of the items offered for sale, and these descriptions may deceptively suggest menu items are healthier than they are.¹⁷⁹ But even if not, restaurant meals are often themselves deceptive.

As noted at the beginning of this paper, diners frequently underestimate the calorie content of their restaurant meals,¹⁸⁰ which can lead to massive additional calories consumed.¹⁸¹ Why do consumers so grossly underestimate the calorie content of their meals? Perhaps they are foolish or delusional. But restaurants contribute to and benefit from this misperception.

One reason diners are misled is that restaurants often sell foods that contain unbelievably large amounts of calories. Consumers may reasonably assume that restaurant meals are somewhat comparable to the same meals prepared at home, or at least, restaurants' versions are only slightly more fattening. These should be reasonable and fair assumptions. If a ham and cheese sandwich at home has 350 calories, then one at a restaurant may have 400 calories or even a few more, the reasoning goes.

But this is incorrect. For example, a ham and Swiss cheese sandwich on rye bread prepared at home may have approximately 350 calories.¹⁸² At the popular restaurant chain, Panera Bread, this same

179. One "study found that restaurants claiming to offer healthier food cause consumers to underestimate calories in main dishes and then order highly caloric side dishes, drinks, or desserts." Banker, *supra* note 15, at 916.

180. See Green, *supra* note 12 and accompanying text.

181. See generally Alexander Chernev, *The Dieter's Paradox*, 21 J. CONSUMER PSYCHOL., 178 (April 2011), available at http://www.chernev.com/research/articles/The_Dieters_Paradox_2011.pdf (arguing that because some people erroneously tend to believe that by adding a "healthy" option to their "unhealthy" meal, it reduces overall calorie intake as opposed to increasing it).

182. 166 calories, 2.2 fat grams for two slices of rye bread, see *Calories in Bread, Rye*, CALORIE COUNT, <http://caloriecount.about.com/calories-bread-rye-i18060> (providing calorie content for one slice of bread, doubled here for a sandwich) (last visited Oct. 31, 2011); 60 calories, 1.5 fat grams for a serving of 2 ounces of deli-meat ham, see *Calories in Honey Ham-Deli Counter*, CALORIE COUNT, <http://caloriecount.about.com/calories-healthy-choice-honey-ham-deli-i82143> (last visited Oct. 31, 2011); 80 calories, 7 fat grams for a serving of deli Swiss cheese, see *Calories in Natural Slice Swiss*, CALORIE COUNT, <http://caloriecount.about.com/calories-deli-deluxe-natural-slice-swiss-i99797> (last visited Oct. 31, 2011); 2 calories, 0 fat grams for lettuce, see *Calories in Lettuce, Cos or Romaine*, CALORIE COUNT, <http://caloriecount.about.com/calories-lettuce->

sandwich weighs in at 590 calories.¹⁸³ That is a sizeable difference, which many reasonable consumers could not foresee.

Given this disparity that many restaurants create by selling deceptively fattening food,¹⁸⁴ it makes sense that diners underestimate

cos-romaine-i11251 (last visited Oct. 31, 2011); 7.5 calories, 0 fat grams in half a medium tomato, *see Calories in Tomatoes*, CALORIE COUNT, <http://caloriecount.about.com/calories-tomatoes-i80399> (providing information for an entire tomato, halved for a sandwich) (last visited Oct. 31, 2011); 10 calories, 0 fat grams for a quarter of a medium red onion, *see Calories in Onion Red*, CALORIE COUNT, <http://caloriecount.about.com/calories-whole-foods-onion-red-i118275>, (providing calories for entire onion, quartered for a sandwich) (last visited Oct. 31, 2011); 35 calories and 3 fat grams for a serving of Miracle Whip Mayonnaise, *see Calories in Dressing*, CALORIE COUNT, <http://caloriecount.about.com/calories-miracle-whip-dressing-i126376> (last visited Oct. 31, 2011); and 5 calories, 0 fat grams in a teaspoon of mustard, *see Calories in Spicy Brown Mustard*, CALORIE COUNT, <http://caloriecount.about.com/calories-goldens-spicy-brown-mustard-i139172> (last visited Oct. 31, 2011). If the sandwich instead contains regular mayonnaise, as opposed to Miracle Whip, it will have an additional 55 calories and 7 grams of fat. *See Calories in Real Mayonnaise*, CALORIE COUNT, <http://caloriecount.about.com/calories-hellmanns-real-mayonnaise-i97424> (last visited Oct. 31, 2011).

183. *See Panera Bread Nutrition Information*, PANERA BREAD, <http://www.panerabread.com/pdf/nutr-guide.pdf> (last visited Oct. 31, 2011) (includes nutritional information for the Full Smoked Ham & Swiss on Stone-Milled Rye sandwich). This sandwich includes 96% fat-free ham, Swiss cheese, lettuce, red onion, tomato, salt and pepper, and rye bread. *See Bakery-Café Menu*, PANERA BREAD, <http://www.panerabread.com/pdf/menu.pdf> (last visited Oct. 31, 2011).

184. Contributing to the disparity may be that portions are often much larger than a single serving at restaurants. *See FUMENTO*, *supra* note 4, at 44–48. Restaurants serve outrageously large portions, which in aggregate anchors consumers toward believing that such portion sizes are appropriate. *Id.* Restaurants also misleadingly characterize portions as “small,” suggesting that one may order a larger size, when the “small size” is already much larger than a healthy amount. *Id.* at 46, 48. “A ‘large’ soda fountain drink in Europe is often smaller than the ‘small’ size sold here.” *Id.* at 46. “A ‘medium’ theater popcorn now contains sixteen cups.” *Id.* at 44. And restaurants use terms like “lite” or “low fat” when items are still incredibly fattening. *Id.* at 71–77 (noting that the food industry rakes in “megabucks” from encouraging overconsumption by labeling food “reduced fat” and “guilt free” despite the fact that foods contain a lot of calories, like The Cheesecake Factory’s “Lite Cheesecake,” which has nearly 600 calories); *see also id.* at 184 (noting that restaurants sell items that are outrageously caloric due to their portion sizes as compared to regular sized portions of the same items). Author Michael Fumento has maintained that portion sizes at restaurants have caused consumers to become completely confused as to appropriate portion sizes, which even causes

the caloric cost of their restaurant meals. Whether restaurants actively intend to deceive or they intend to earn the most profits and deception is only a secondary effect, diners are often misled.¹⁸⁵

Without calorie information,¹⁸⁶ diners might reasonably assume that they are making health-conscious choices when they are not.¹⁸⁷ “Few people would guess that a small milkshake has more calories than a Big Mac or that a tuna sandwich from a typical deli contains twice as many calories as the roast beef with mustard.”¹⁸⁸ And many diners would probably believe that a salad with chicken is a healthier choice than a steak, but the Cobb Salad with grilled chicken at the popular restaurant chain Chili’s contains 710 calories and 52 grams of fat, which is nearly twice as many calories and six times as much fat as their Grill Classic Sirloin Steak, which has 370 calories and 9 grams of fat.¹⁸⁹

Many restaurants actively contribute to consumer misperception by selling foods that contain many more calories and fat than they would if prepared at home, and by presenting foods as healthier than they

over-consumption at home also. *Id.* at 47–48 (“Someone confronted with a mass of giant hamburger sandwiches at every hamburger outlet may understandably conclude that a normal-size hamburger contains a third or a half pound of beef, and will start to make and consume such sandwiches at home [and] in restaurants.”).

185. Even assuming restaurants do not intend to mislead consumers, *Zauderer* may still apply because it does not require mens rea. *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 652–53 (1985) (discussing the likely possibility of consumer deception). *Zauderer* does not even require proof that the public will actually be misled. *Id.* When the possibility of deception is fairly “self-evident,” the Court assumes it is true. *Id.*

186. “[A]bout half of restaurant chains [already] provide calorie information but put it in places where it is unlikely to be seen.” Marion Nestle, *Health Care Reform in Action — Calorie Labeling Goes National*, 362 NEW ENG. J. MED. 2343, 2344 (2010), available at <http://www.nejm.org/doi/pdf/10.1056/NEJMp1003814>.

187. *See, e.g., Banker, supra* note 15, at 916 (offering some reasons why diners might reasonably assume they are making healthy decisions at restaurants when they are not). Restaurants cause this diner misperception. *See supra* note 181.

188. *Menu Labeling*, CENTER FOR SCIENCE IN THE PUBLIC INTEREST, <http://www.cspinet.org/menulabeling/> (last visited Oct. 19, 2011).

189. *See Nutritional Information*, CHILI’S, http://www.chilis.com/EN/LocationSpecificPDF/MenuPDF/001.005.0000/Chilis_Nutrition_Menu_Generic.pdf (last visited Sept. 17, 2011).

actually are.¹⁹⁰ This may be because fattening food is often perceived as tastier than healthier alternatives,¹⁹¹ and tastier food leads to increased profits.¹⁹² But given the current zeitgeist favoring healthy eating, restaurants suggest that items on their menus are healthier than they actually are.¹⁹³

Deceptive advertising suggesting that foods are healthier than they are is nothing new in the food industry. According to FDA Commissioner Margaret Hamburg, “concerns that food labels may mislead consumers about the nutritional value of their products ha[s] caught the attention of the agency.”¹⁹⁴ As a result, “food manufacturers have been called on the carpet,” the most recent in June “when Kellogg[’s] was warned for making false claims on the front of one of its bestselling cereals: Rice Krispies.”¹⁹⁵ Kellogg’s advertised that the cereal improved children’s health, a claim not backed with scientific evidence.¹⁹⁶ This unsupported claim was similar to the company’s claim last year that Frosted Mini Wheats improves children’s attentiveness.¹⁹⁷

190. See *Resources: Menu Labeling*, CALIFORNIA CENTER FOR PUBLIC HEALTH ADVOCACY, http://www.publichealthadvocacy.org/resources_menulabeling.html (last visited Sept. 17, 2011); See also *supra* note 181 and accompanying text.

191. See FUMENTO, *supra* note 4, at 88 (maintaining that Americans have become accustomed to the taste of sugary and caloric foods and that items lacking the requisite large amounts of sugar are not palatable to the average American); see also Banker, *supra* note 15, at 919 (noting that consumers may perceive healthy food as less tasty than less healthy food).

192. See Banker, *supra* note 15, at 918 (noting that an argument against menu-labeling is that it will decrease restaurant revenue because consumers may stop ordering unhealthy items when they realize just how unhealthy they are). Bigger portions also lead to increased profits. See FUMENTO, *supra* note 4, at 44–45. “By one estimate, nearly 25 percent of the \$97 billion American consumers spent on fast food in 1995 went for items promoted on the basis of a larger size or extra ingredients.” *Id.* at 44. Restaurants that provide increased portions have received increased popularity and profits. See *id.* at 44–45.

193. See CALIFORNIA CENTER FOR PUBLIC HEALTH ADVOCACY, *supra* note 190; see also *supra* note 184.

194. Susan Brady, *FDA Cracking Down on Deceptive Advertising*, HEALTH NEWS (Sept. 27, 2010).

195. *Id.*

196. *Id.*

197. *Id.* For more dubious cereal marketing by Kellogg’s competitor, General Mills, see Bonnie Liebman, *Name that Deception—Deceptive Advertising by the*

Like Kellogg's, fast food giant McDonald's deceived customers with their food marketing.¹⁹⁸ They described their french fries as vegetarian (perceived as healthy) despite that they included beef fat (lard, perceived as unhealthy) in their preparation.¹⁹⁹ After a lawsuit, McDonald's "agreed to donate \$10 million to Hindu and vegetarian groups as part of a settlement."²⁰⁰ By actively deceiving consumers, food peddlers cause misperception about the healthfulness of their foods.

Of course, consumers are not completely without responsibility for their misperception of the calorie content of their restaurant meals. Many factors may contribute to it. One might be wishful thinking. A diner might like to eat a giant bacon cheeseburger but not want to worry about the damage to her waistline, so she fudges the numbers in her head to make herself feel better about her purchase.²⁰¹

Though consumers may shoulder some responsibility for deception over their restaurant meals, *Zauderer* should still apply.

Food Industry, NUTRITION ACTION HEALTH LETTER (Dec. 1993), http://findarticles.com/p/articles/mi_m0813/is_n10_v20/ai_15498342/.

198. Seth Stern, *Fast-Food Restaurants Face Legal Grilling: Lawyers Explore Whether the Fast-Food Industry should be Liable for the Effects its Meals and Marketing have on Public Health*, THE CHRISTIAN SCIENCE MONITOR (Aug. 8, 2002), <http://www.csmonitor.com/2002/0808/p14s01-usju.html>.

199. *Id.*

200. *Id.*

201. Other psychological processes may also be at issue. One researcher coined the term "dieter's paradox" to describe an issue the calorie conscious have with accurately estimating the caloric content of their food. See Chernev, *supra* note 181, at 178. According to marketing professor Alexander Chernev, consumers tend to underestimate the caloric content of their food, and this propensity is even stronger among weight-conscious people. See *id.* at 178–79. Chernev's research revealed that consumers unknowingly believe that combining a healthy item with an unhealthy item reduces the calories in the unhealthy item. See *id.* at 179–80. Participants in Chernev's study erroneously estimated that a bowl of chili paired with a green salad contained fewer calories than one not paired with this healthy side. See *id.* at 179. Chernev described this phenomenon as a "negative-calorie illusion." See *id.* at 178. Consumers think that they can eat more food because part of what they are eating is healthy, as if the healthy item contains negative calories that remove calories from the fattening item. See *id.* This fallacy leads to overconsumption. See *id.* at 180–81. Chernev's findings show that consumers are easy targets for deception regarding the calorie content of their meals. See *id.* at 181–83.

Zauderer does not require that consumers bear no responsibility.²⁰² After all, consumers reading *Zauderer*'s advertisements could have questioned whether no "legal fees" owed to *Zauderer* meant no money due for the case at all, such as to the court for filing the case, but the Court did not put the burden on consumers.²⁰³ Rather, it put the burden on the commercial speaker to disclose more information and eliminate any potential deception caused by advertising his services.²⁰⁴ The same should occur here.

Because restaurant meals contain a misleading amount of calories, diners do not realize that with their restaurant meals they are consuming extra calories, which results in weight gain and an increased risk of obesity.²⁰⁵ The federal menu-labeling law shines a brighter light on the calorie content of restaurant meals. This information assists consumers and prevents them from being misled into believing that their meals are less fattening than they actually are. Because the federal menu-labeling law reduces consumer deception,²⁰⁶ *Zauderer* should apply even if *Zauderer* only applies to factual-disclosure requirements that target consumer deception.²⁰⁷

Zauderer, not *Central Hudson*, is the appropriate framework to test the validity of the federal menu-labeling law. *Zauderer* should apply to this factual-disclosure requirement irrespective of whether the

202. See generally *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) (requiring an attorney to avoid deceptive or misleading messages in advertisements, but not removing consumer responsibility in interpreting the advertisement).

203. See *id.* at 652.

204. See *id.* at 652–53.

205. See *supra* notes 179–84, 189–200 and accompanying text.

206. In *New York State Restaurant Ass'n*, New York City alternatively argued that its menu-labeling law was adopted to prevent misleading advertising practices (as compared to informing the public to prevent obesity) and would thus be subject to *Zauderer* for this reason. *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114, 133 n.21 (2d Cir. 2009). Because the court "conclude[d] that laws mandating factual disclosures are subject to [*Zauderer*] even if they address non-deceptive speech, [it did] not reach this argument." *Id.*

207. Nothing in the relevant provisions of the Healthcare Act forecloses the argument that the menu-labeling provisions target consumer deception. See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 4205(b), 124 Stat. 119, 573–76 (2010) (to be codified as amended at 21 U.S.C. § 343(q)(5)).

government interest is solely preventing consumer deception. But even if *Zauderer* is limited to laws targeting consumer deception, it properly applies to this federal law.

E. The Compelled-Speech and Subsidy Paradigms Should not Control

Another framework is arguably relevant to determining whether a menu-labeling law should survive constitutional scrutiny: the compelled-speech and compelled-subsidy lines of cases. These doctrines are not controlling here, however.

1. Compelled-Speech Doctrine is Inapposite

In *Zauderer*, the Court distinguished the compelled-speech line of cases, from *Wooley v. Maynard*²⁰⁸ back, in which the Court found that compulsion to speak may violate the First Amendment.²⁰⁹ As the *Zauderer* Court recognized in fashioning a different test for factual-disclosure requirements, the state was not attempting to “prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”²¹⁰ Rather, the state was attempting “only to prescribe what shall be orthodox in commercial advertising,” and it did so by imposing a purely factual-disclosure requirement, not a compelled political or ideological message.²¹¹ The Court subjects such a factual-disclosure requirement to *Zauderer*’s lenient scrutiny.²¹²

208. 430 U.S. 705, 713 (1977) (holding that the State may not “constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public”).

209. See *Zauderer*, 471 U.S. at 650–51; cf. *Env’tl. Def. Ctr. v. EPA*, 344 F.3d 832, 849–50 (9th Cir. 2003) (distinguishing cases like *Wooley v. Maynard* from *Zauderer* and regulations requiring municipalities distribute information educating the public about impacts of storm-water discharge and hazards of improper waste disposal).

210. *Zauderer*, 471 U.S. at 651 (quoting *W. Va. State Bd. of Educ. v. Barnett*, 319 U.S. 624, 642 (1943)).

211. *Id.*

212. *Id.* at 650–51.

The federal menu-labeling law is analogous to Ohio's requirement that Zauderer disclose that clients would be liable for costs in addition to fees.²¹³ It is a law mandating the disclosure of purely factual information: the caloric content of menu items in the context of a recommended daily caloric intake.²¹⁴ The law requires that the Secretary provide by regulation a succinct statement of the suggested daily caloric intake.²¹⁵ The law does not compel restaurants to express any opinions on healthy food versus unhealthy food or to otherwise editorialize on obesity.²¹⁶ It simply requires that restaurants provide facts—the number of calories in menu items in the context of the total number of calories healthy for daily consumption.²¹⁷ It does not prevent restaurants from

213. See *id.* at 633; see also *Env'tl. Def. Ctr.*, 344 F.3d at 849–50 (analogizing to *Zauderer* and distinguishing cases like *Wooley v. Maynard* where regulations require municipalities to distribute information educating the public about impacts of storm-water discharge and the hazards of improper waste disposal).

214. See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 4205(b), 124 Stat. 119, 573–76 (2010) (to be codified as amended at 21 U.S.C. § 343(q)(5)).

215. See *id.*

216. See *id.*

217. Admittedly, the requirement that restaurant's provide a statement regarding the recommended daily caloric intake is less straightforward than the requirement that they provide calorie content. The latter is clearly factual information, but the former, which is the government's recommendation, seems less like a "fact" and more like an opinion of how many calories one should consume in a day. Because the menu-labeling law does not provide the phraseology of the suggested daily caloric intake but instead grants the Secretary authority to create the statement, it is difficult to assess the actual statement. But one can imagine that it may be based on the Dietary Guidelines the Department of Health and Human Services and the USDA publish every five years. See *Dietary Guidelines for Americans 2010*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, <http://health.gov/dietaryguidelines/dga2010/DietaryGuidelines2010.pdf> (last visited Oct. 19, 2011). These guidelines are based on recommendations put forth by a committee of scientific experts who create a report on which the public has an opportunity for notice and comment. See U.S. Department of Health and Human Services & Department of Agriculture, *Dietary Guidelines for Americans 2005*, <http://www.health.gov/dietaryguidelines/dga2005/document/pdf/DGA2005.pdf>; Press Release, U.S.D.A., *USDA and HHS Announce New Dietary Guidelines to Help Americans Make Healthier Food Choices and Confront Obesity Epidemic*, <http://www.cnpp.usda.gov/Publications/DietaryGuidelines/2010/PolicyDoc/PressRelease.pdf>. It is thus likely that restaurants will need to provide the fact of what the scientists, public, and government have discovered is the average, healthy, daily

adding any other information or from editorializing viewpoints for or against healthy eating.²¹⁸ Because the menu-labeling law mandates a factual disclosure of commercial speech rather than compelling the espousal of a political or ideological message, it is more akin to *Zauderer* than to the compelled-speech cases, which should not govern.

2. Compelled-Subsidy Doctrine is Inapposite

Related to the compelled-speech line of cases and similarly distinguishable here is the compelled-subsidy doctrine.²¹⁹ Compelled speech requires an individual to personally express a message with which

caloric intake. This fact is necessary to provide context to the calories in menu items. *See supra* note 49. This is similar to a requirement that a label provide the Surgeon General's warning of the carcinogenic properties of cigarettes. *See Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006) (distinguishing the subjective labeling of video games from the surgeon general's warning that cigarettes contain carcinogens). And it is similar to the requirement that municipalities distribute educational materials about the impacts of storm water on waterbodies and what the public can do to reduce pollutants. *See Envtl. Def. Ctr v. EPA*, 344 F.3d 832, 848–50 (9th Cir. 2003). As the Ninth Circuit has explained, requiring distributing “appropriate educational and public information activities” is not the same as compelling espousal of an ideological message. *See id.* at 849–50. Further, the menu-labeling law does not prevent restaurants from adding editorials with their own views on this recommended daily caloric intake. *Id.* For example, the USDA recommends 2,000 calories a day, but McDonald's thinks 4,000 a day is more appropriate. *Cf. Milavetz, Gallop & Milavetz, P.A. v. United States*, ___ U.S. ___, ___, 130 S. Ct. 1324, 1340 (2010) (noting that challenged provisions share *Zauderer's* features, including that disclosures provide only accurate statements, and they do not prevent conveying additional information); *Zauderer*, 471 U.S. at 650 (explaining that factual disclosures simply require a speaker to provide more information but do not prevent a speaker from stating anything); *see also supra* notes 103–05 and accompanying text. Though less straightforward than the calorie counts, this aspect of the law should not render the law compelled speech. *See supra* notes 106–11 and accompanying text.

218. *See Patient Protection and Affordable Care Act*, § 4205(b), 124 Stat. at 573–76.

219. At least one commentator thinks this doctrine is relevant here. *See Pomeranz, supra* note 7, at 178–81. In discussing this framework, Jennifer Pomeranz identifies two central cases governing compelled funding of speech in the commercial context: *U.S. Dept. of Agric. v. United Foods*, 533 U.S. 405 (2001) and a case predating it, *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997). *See id.*

she disagrees. In contrast, a compelled subsidy occurs when an individual is compelled to subsidize someone else's private speech with which she disagrees.²²⁰ The compelled-subsidy cases grew out of the compelled-speech cases, the idea being that if the government may not compel a person to express a message, then it should not compel a person to fund the same message of another private party.²²¹

"In all of the cases invalidating exactions to subsidize speech, the speech was, or was presumed to be, that of an entity other than the government itself."²²² If, however, the subsidy is to fund government speech (even if someone other than the government is the actual speaker), the First Amendment is not implicated.²²³

The compelled-subsidy cases are not controlling for menu-labeling laws for two reasons. First, the compelled-subsidy cases grew out of the compelled-speech cases, which the Supreme Court distinguished in *Zauderer*, and the compelled-subsidy cases are distinguishable here on the same basis.²²⁴ Assuming that the menu-labeling law requires restaurants to expend funds (to alter their menus, compile calorie information, et cetera), this is not money expended disseminating another's ideological message. Rather, it is money expended to provide factual disclosures, and as *Zauderer* shows, this is a crucial distinction.²²⁵

220. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 557, 565 n.8 (2005).

221. *See id.* at 557; *see also United Foods, Inc.*, 533 U.S. at 410. In *United Foods*, the Court explained that just as the First Amendment may prevent the government from compelling individuals to espouse views with which they disagree, so too may it prevent the government from compelling individuals to fund views with which they disagree. *United Foods, Inc.*, 533 U.S. at 410. In the former, one is compelled personally to express a message or viewpoint while in the latter she is required to subsidize someone else's expression of it. *Johanns*, 544 U.S. at 557. The Court has thus invalidated laws requiring compulsory funding of private entities' political speech or speech espousing certain views with which the funder disagrees. *See id.* at 557–58; *see also United Foods, Inc.*, 533 U.S. at 410–11, 413. *But see United Foods, Inc.*, 533 U.S. at 413 (noting that the compelled assessment need not necessarily fund political speech to implicate the First Amendment).

222. *Johanns*, 544 U.S. at 559.

223. *See id.* at 559–64.

224. *See supra* notes 208–211, 219–21 and accompanying text.

225. *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 650–51 (1985). Analyzing *United Foods* and *Glickman*, Pomeranz makes a similar point. *See Pomeranz supra* note 7, at 179–80. She argues that the compelled funding of

political or ideological speech should be distinguished from the compelled funding of generic advertising that does not promote a particular political or ideological message. *See id.* Pomeranz suggests that *United Foods* and *Glickman* present a dichotomy. *See id.* Where a regulatory scheme compels funding of generic, factually accurate advertising, this does not offend the First Amendment, but where the government mandates subsidizing a message with which the commercial actor disagrees, this creates a First Amendment issue. *See id.* According to Pomeranz, “there is an important distinction between these two cases that often goes unrecognized. In *United Foods*, the Court found that the compelled message was contrary to the producer’s interests and beliefs, but in *Glickman*, the scheme at issue was for ‘factually accurate advertising.’” *See id.* Pomeranz thus maintains that “*United Foods* stands for the proposition that the government cannot require a speaker to subsidize a controversial viewpoint.” *See id.* Pomeranz’s interpretation supports the point made here, that compelled subsidies of viewpoint messages differ from compelled subsidies for factual disclosures. It seems, however, that Pomeranz’s interpretation of these two cases does not sufficiently account for an important point. The distinction between these cases also hinges importantly on the extensiveness of the regulatory scheme at issue. In *United Foods*, a federal statute regulated mushroom handlers, but it did not mandate cooperation amongst handlers as the comprehensive regulatory scheme in *Glickman* did. *See United Foods, Inc.*, 533 U.S. at 408. The statute in *United Foods* mandated that mushroom handlers pay assessments to fund advertising to promote mushroom sales. *Id.* A mushroom handler challenged the assessments as violative of the First Amendment because they forced the handler to fund the message that mushrooms were worth consuming irrespective of the brand, yet the handler wanted to convey the message that its mushrooms were superior. *See id.* at 408–09, 411. The Court explained that *Glickman* did not control. *Id.* at 409. It phrased the issue as “whether the government may underwrite and sponsor speech with a certain viewpoint using special subsidies exacted from a designated class of persons, some of whom object to the idea being advanced.” *Id.* at 411. Citing the cases prohibiting the government from compelling individuals to express certain ideas, the Court explained, “First Amendment concerns apply here because of the requirement that producers subsidize speech with which they disagree.” *Id.* at 410–11. This supports Pomeranz’s point that an important issue is whether the subsidy compels funding viewpoint speech versus funding factually accurate, generic advertising. But *United Foods’* treatment of *Glickman* shows that this is not the entire story; equally important is the nature of the regulatory scheme in which the compelled subsidy arises. As the Court explained, the program upheld in *Glickman* differed “in a most fundamental respect.” *Id.* at 411. “In *Glickman* the mandated assessments for speech were ancillary to a more comprehensive program restricting marketing autonomy. [In *United Foods*] . . . the advertising itself, far from being ancillary, [wa]s the principal object of the regulatory scheme.” *Id.* at 411–12. The Court thus distinguished *Glickman*, where the compelled subsidy did not violate the First Amendment because it involved a detailed regulatory scheme that already favored cooperation over autonomy. *Id.* at

Second, any funds restaurants expend to comply with the law do not fund another's private message. Even assuming that the law requires restaurants to expend funds disseminating a message as compared to factual disclosures—a point disputed above—it is the government's "message" and not the message of another private party. Compelled funding of the government's message does not pose a First Amendment problem.²²⁶

Neither the compelled-subsidy nor compelled-speech paradigms should control analysis of the menu-labeling law. *Zauderer* provides the best lens available for analyzing the validity of this law.²²⁷

IV. THE MENU-LABELING LAW SHOULD SURVIVE *ZAUDERER*

The federal menu-labeling law should withstand *Zauderer*'s scrutiny. To survive, the menu-labeling law need be only reasonably related to the government's legitimate interest.²²⁸

The government's interest in providing calorie information to eliminate deception so that consumers may make more healthful restaurant selections to curb obesity and improve public health is unquestionably a legitimate interest.²²⁹ And the means the government has chosen to accomplish that goal—mandating the posting of calorie information on menus and menu boards—is reasonably related to the government's purpose.²³⁰ The law should easily satisfy *Zauderer*'s lenient requirements.

412. Because the Court emphasized the nature of the regulatory scheme in distinguishing *United Foods* from *Glickman*, it is difficult to conclude for sure that these cases show that the nature of the subsidy itself dictates whether the subsidy violates the First Amendment.

226. See *supra* notes 222–23 and accompanying text.

227. At least one commentator maintains that neither *Zauderer* nor *Central Hudson* provides a perfect fit for menu-labeling laws, and a hybrid between *Central Hudson* and strict scrutiny is preferable. See Yates, *supra* note 119, at 812, 819–23.

228. See *infra* Part IV.A.

229. See *infra* Part IV.B.

230. See *infra* Part IV.C.

A. Zauderer's Lenient Standard

Zauderer never expressly identified the level of review the Court applied.²³¹ Instead, it stated that “an advertiser’s rights are adequately protected as long as disclosure requirements are reasonably related to the State’s interest in preventing deception of consumers.”²³²

This standard has been variously described as a reasonable-relationship rule,²³³ a rational relationship test,²³⁴ and rational-basis review.²³⁵ Labeling is less important than ascertaining the test’s general

231. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 650–53 n.14 (1985).

232. *Id.* at 651.

233. See, e.g., *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 115 (2d Cir. 2001); Ryan M. Murphy, *Supreme Court Issues Final Word on Constitutional Challenges to Regulation of Attorney Speech Under BAPCPA*, 19 NORTON J. OF BANKR. L. & PRAC. 283, 288 (2010) (describing *Zauderer*’s rule as the “reasonable relationship standard”); Yates, *supra* note 118, at 808; Leslie Gielow Jacobs, *What the Abortion Disclosure Cases Say About the Constitutionality of Persuasive Government Speech on Product Labels*, 87 DENV. U. L. REV. 855, 875 (2010); Sara Murray, Comment, *The Whole Truth or Nothing but the Truth? Should Attorneys Who Advertise Be Required to Disclose Prior Disciplinary Actions Taken Against Them?*, 21 ST. MARY’S L. J. 953, 980 (1990) (citing *Zauderer* as establishing “reasonable relationship review for disclosure requirements” (internal quotation marks omitted)); Jeannine Lane, Comment, *New York’s Treatment of Attorney Advertising: Greater First Amendment Freedoms, But at What Cost?*, 51 ALB. L. REV. 51, 90 (1986).

234. See *Video Software Dealers Ass’n v. Schwarzenegger*, 556 F.3d 950, 966–67 (9th Cir. 2009).

235. See, e.g., *United States v. Marzzarella*, 614 F.3d 85, 96 (3d Cir. 2010) (stating that commercial-disclosure requirements trigger a rational-basis test and citing *Zauderer* for this); *Conn. Bar Ass’n v. United States*, 620 F.3d 81, 95 (2d Cir. 2010) (noting that *Zauderer* stated a rational-basis test); *Int’l Dairy Foods Ass’n v. Boggs*, 622 F.3d 628, 642–43 (6th Cir. 2010) (applying *Zauderer* and treating rational basis as part of it); *N.Y. State Rest. Ass’n v. N.Y. City Bd. of Health*, 556 F.3d 114, 132 (2d Cir. 2009) (“In light of *Zauderer*, this Circuit thus held that rules ‘mandating that commercial actors disclose commercial information’ are subject to the rational basis test” (quoting *Sorrell*, 272 F.3d at 114-15)); *Pharm. Care Mgmt. Ass’n v. Rowe*, 429 F.3d 294, 316 (1st Cir. 2005) (Boudin, J., concurring) (“[*Zauderer*’s test] is a test akin to the general rational basis test governing all government regulations under the Due Process Clause.”); Lane, *supra* note 233, at 90.

elements so they can be applied to other situations, particularly where the government interest is other than preventing consumer deception.

One element of this test is the government's interest. Though the Court never specified the level of interest *Zauderer* requires, it provided a clue when it rejected appellant's argument that *Central Hudson* should apply, which would have required a substantial government interest and satisfaction of intermediate scrutiny.²³⁶ According to the Court, appellant, in arguing for this *more stringent test*, "overlooks material differences between disclosure requirements and outright prohibitions on speech."²³⁷ The former need not satisfy as intense scrutiny as the latter.²³⁸ This suggests that whatever level the government interest in *Zauderer* is specifically categorized as, it is less than substantial, and *Zauderer's* test is less than intermediate scrutiny.

The Court provided another clue when it instructed that a commercial speaker's interest in not providing factual information is

City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993) should be distinguished here. In that case, the Court broadly stated that it has rejected rational-basis review to judge *restrictions* on commercial speech. *City of Cincinnati*, 507 U.S. at 417 n.13. This does not apply here because the law is a factual disclosure not a restriction on speech. Indeed, the case that *City of Cincinnati* cites for this premise rejects rational-basis review as a component of *Central Hudson's* test, not *Zauderer's*. See *id.* at 417 nn.12–13; see also *Bd. of Trustees v. Fox*, 492 U.S. 469, 475–81 (1989).

236. See *Zauderer*, 471 U.S. at 650–53 n.14; see also *Milavetz, Gallop & Milavetz P.A. v. United States*, ___ U.S. ___, ___, 130 S. Ct. 1324, 1340 (2010) (describing *Central Hudson's* scrutiny as intermediate). The Second Circuit appears to have followed the Supreme Court in *Zauderer*. See *N.Y. State Rest. Ass'n*, 556 F.3d at 131–32. In *New York Restaurant Ass'n*, the Second Circuit failed to classify the government's asserted interest of combating obesity as legitimate, important, substantial, or compelling. See *id.* at 134–36. Nor did it engage in the preliminary task of identifying what level of government interest *Zauderer* requires. See *id.* Instead, it skipped this and addressed whether New York's law is reasonably related to its goal of combating obesity. See *id.* The court seems to have implicitly found combating obesity is a government interest equivalent to preventing consumer deception, but it never overtly states this. See *id.* at 134. However, the court does state that it is applying rational basis review. *Id.* From this one can assume that the requisite government interest at stake is a "legitimate" one. See 16 C.J.S. *Constitutional Law* § 204 (2011).

237. *Zauderer*, 471 U.S. at 650.

238. See *id.* at 650–51.

minimal.²³⁹ If the speaker's interest is minimal, one can fairly assume that the government's interest need only be slightly more than minimal to outweigh the speaker's interest.

Rational basis review requires a legitimate interest,²⁴⁰ the least government interest of the three traditional levels of constitutional scrutiny.²⁴¹ Borrowing the level of government interest from this test makes sense in light of the Court's description of the interest in *Zauderer*.²⁴²

239. *Id.* at 651.

240. *See* 16 C.J.S. *Constitutional Law* § 204; *see also* *Fox*, 492 U.S. at 480 (noting that the rational basis test is satisfied if the law furthers a legitimate government goal).

241. *See* *United States v. Virginia*, 518 U.S. 515, 566–76 (1996) (Scalia, J., dissenting) (discussing rational basis, intermediate scrutiny, and strict scrutiny and showing that rational basis is the least stringent test); *Fla. Bar v. Went for It, Inc.*, 515 U.S. 618, 623, 632 (1995) (noting that rational basis review is less rigorous than *Central Hudson's* intermediate scrutiny); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 790–91 (1994) (Scalia, J., dissenting) (discussing these forms of scrutiny and noting that intermediate is between strict scrutiny on one end and rational basis on the other); *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (explaining that intermediate scrutiny is between the extreme leniency of rational basis and extreme stringency of strict scrutiny); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 301 (1986) (Marshall, J., dissenting) (describing rational basis as the “least rigorous” standard of review). The three traditional levels of constitutional scrutiny are rational basis, intermediate scrutiny, and strict scrutiny. *See* *D.C. v. Heller*, 554 U.S. 570, 634 (2008) (noting that these are the traditionally expressed levels of constitutional scrutiny).

242. Even assuming that *Zauderer's* test is not akin to rational basis because rational-basis review is seldom applied where First Amendment rights are at stake, *see* MARC A. FRANKLIN ET AL., *MASS MEDIA LAW* 32 (7th ed. 2005), the government's interest in preventing consumer deception to improve public health should satisfy the requisite interest provided by intermediate scrutiny because it is an important and substantial interest. *Cf., e.g., City of Erie v. Pap's A.M.*, 529 U.S. 277, 296 (2000) (finding government interest in protecting public health and safety is an important interest); *Jaffee v. Redmond*, 518 U.S. 1, 11 (1996) (noting that the physical health of the citizenry is of “transcendent importance”); *Fla. Bar*, 515 U.S. at 625 (finding interest substantial because it is connected to protecting public health and safety); *Friedman v. Rogers*, 440 U.S. 1, 15 (1979) (explaining that government interest in preventing consumer deception is “substantial”). Perhaps the interest *Zauderer* requires lies somewhere between legitimacy and importance. Either way, the interest at stake here should satisfy this standard because it is an important interest.

The second element is the relationship between that interest and the means chosen to accomplish it. *Zauderer* provides that the means must be “reasonably related” to the government’s interest.²⁴³ “Reasonably related” seems similar to “rationally related,” which describes the means in rational-basis review.²⁴⁴ “Reasonable” is defined by Webster’s Dictionary as “capable of rational behavior” and “rational” is “agreeable to reason; reasonable; sensible.”²⁴⁵

Even if not identical to the very lenient rational-basis standard, *Zauderer* shows that “reasonably related” is not a particularly stringent requirement.²⁴⁶ There the Court hardly scrutinized the State’s reasons for its factual-disclosure requirement, finding that the rules easily passed the test because the State’s “assumption” that substantial numbers of consumers would be misled was supported by “commonplace” knowledge.²⁴⁷ The Court did not require any evidence but instead found the State’s position “reasonable enough” to support its disclosure requirement.²⁴⁸ This is hardly searching or rigorous scrutiny.²⁴⁹

Admittedly, *Zauderer* involved attorney advertising,²⁵⁰ and one may contend that this is why the Court implemented a standard deferential to government regulation. As the Court highlighted, a layperson not familiar with legal terms of art could read *Zauderer*’s advertisement and not appreciate the difference between legal fees and

243. See *Zauderer*, 471 U.S. at 651.

244. See 16 C.J.S. *Constitutional Law* § 204.

245. See RANDOM HOUSE, WEBSTER’S UNABRIDGED DICTIONARY, 1603, 1608 (2d ed. 2001); see also *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 738 (2007) (describing a court’s use of “reasonableness” as the court applying rational-basis review); cf. also Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 688 (2007) (explaining that state courts use a reasonable-regulation standard in the Second Amendment context that is not identical to the rational-basis review used elsewhere in the law, but it is equally deferential).

246. See *Zauderer*, 471 U.S. at 652.

247. See *id.*

248. *Id.*

249. But cf. *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (finding law survived *rigorous* strict scrutiny because “[a] long history, a substantial consensus, and *simple common sense* show that some restricted zone around polling places is necessary to protect that fundamental right” (emphasis added)).

250. See *Zauderer*, 471 U.S. at 652.

other financial obligations, such as costs.²⁵¹ Restaurant menus, of course, do not generally contain such terms of art puzzling to a layperson.

But the Court did not limit *Zauderer* to cases involving attorney advertising.²⁵² Rather, the Court rejected the State's argument that it should treat *Zauderer*'s advertising differently because it was legal advertising, explaining that it is no more difficult to distinguish truthful and accurate claims from misleading and deceptive claims in legal advertising than in other advertising.²⁵³ It rejected a qualitative distinction between attorney advertising and other advertising, stating that "assessment of the validity of legal advice and information contained in attorneys' advertising is not necessarily a matter of great complexity; nor is assessing the accuracy or capacity to deceive of other forms of advertising the simple process the State makes it out to be."²⁵⁴ *Zauderer* thus is not limited to attorney advertising.²⁵⁵

Though *Zauderer* is not limited to attorney advertising, the type of advertising and other situational factors may be relevant in determining the amount of evidence needed to determine whether the government's means is reasonably related to accomplishing its objective.²⁵⁶ Where, as in *Zauderer*, the possibility of harm is "self-evident," the Court does not appear to require the government to support it with any evidence, relying instead on "assumption[s]."²⁵⁷ If, however,

251. *Id.*

252. *See id.* at 644–45, 650–51.

253. *See id.* at 644–46.

254. *Id.* at 645–46. Though the Court has treated some forms of attorney communication as special and particularly likely to involve overreaching, like in person solicitation, *see, e.g.,* *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 464–67 (1978), not all attorney communication need receive special treatment. *See Zauderer*, 471 U.S. at 644–46.

255. Courts have applied *Zauderer* beyond the legal context. *See, e.g.,* *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 640–42 (6th Cir. 2010) (applying *Zauderer* to labeling dairy products); *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114, 131–34 (2d Cir. 2009) (applying *Zauderer* to calorie-disclosure law); *Env'tl. Def. Ctr. v. EPA*, 344 F.3d 832, 849–50 (9th Cir. 2003) (applying *Zauderer* to regulation requiring municipalities to distribute information educating public about impacts of storm-water discharge and hazards of improper waste disposal).

256. *See Zauderer*, 471 U.S. at 652–53.

257. *See id.*

the possibility of harm absent government intervention is not self-evident, then perhaps the state must offer some evidence to satisfy *Zauderer's* standard.

The government may thus need to show that absent calorie information, consumer deception at restaurants is self-evident and may be assumed. Or, the government may need to present some evidence supporting this contention. For instance, it may cite to studies showing that without menu labeling, restaurant meals mislead consumers. Though the government may need to provide some evidentiary support to satisfy *Zauderer* where the risk of harm is not self-evident, this should not prevent *Zauderer's* lenient review from applying in the first place.

Zauderer's standard thus should apply here and require showing that the menu-labeling law is reasonably related to the government's legitimate interest of preventing deception to enable consumers to make healthier restaurant-meal selections to curb obesity and improve public health. Even if reasonably related is slightly more stringent than rationally related, the menu-labeling law should survive this standard. It is not unreasonable to believe that with more information consumers will be empowered to make healthier decisions, and this will improve public health to some degree. The government may, however, need to support this with more than bare assumptions to satisfy *Zauderer*.

B. The Government's Legitimate Interest

Though the menu-labeling law does not explicitly state the government's interest,²⁵⁸ two inter-related interests exist. The first and most obvious interest behind a law requiring point-of-sale disclosure of calorie information is to curb obesity. A second interest, which is arguably intertwined with the first, is to provide information to prevent consumer deception to aid in achieving the goal of curbing obesity.²⁵⁹ Combining these two interests, one may phrase the government interest

258. See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §4205, 124 Stat. 119 (2010). "According to the House Committee on Energy and Commerce, the purpose of the new legislation 'is to give consumers important health information, and allow them to exercise choice and responsibility about what they and their children eat.'" See Banker, *supra* note 15, at 905.

259. See *supra* Part III.D.2.

as making nutritional information readily apparent to consumers to eliminate deception about the calorie content of restaurant meals so that they may make more healthful choices to curb obesity and promote public health.²⁶⁰

Turning first to targeting obesity, activity preceding passage of the law suggests that it is a relevant interest. It is no secret that obesity has become a top public-health priority, and various relevant parties, including the United States Surgeon General, have focused on tackling it and have urged action.²⁶¹

The Center for Science in the Public Interest organized support for the federal law after issuing a report in 2003 maintaining that labeling would help curb rising obesity rates.²⁶² Following that, “[i]n 2004, an FDA Obesity Working Group report, ‘Calories Count,’ recommended providing nutrition information at the point of sale in restaurants.”²⁶³ The FDA had a nonprofit organization review that information, and a 2006 report of that nonprofit group “urged that posting [calorie information] be more accessible.”²⁶⁴ It also concluded that the importance of customers’ right to know the calorie content of their food outweighed any other countervailing considerations.²⁶⁵ Given the governmental focus on curbing obesity that surrounded the passage of this law and the nature of the law itself, one may conclude that a primary interest is providing consumers with point-of-sale nutritional information so that they may make more healthful choices in an effort to reduce obesity and promote public health.²⁶⁶

Related to this objective is the government interest of preventing consumer deception. As discussed at length in Part III.D.2, these interests are arguably intertwined. Deception by food establishments leads consumers (who eat at restaurants more than ever)²⁶⁷ to grossly

260. See *supra* Part III.D.2.

261. See *supra* note 17 and accompanying text; Nestle, *supra* note 186, at 2344.

262. See Nestle, *supra* note 186, at 2344.

263. See *id.*

264. See *id.*

265. See *id.*

266. The legislative history for this law does not appear to undermine this conclusion. See *supra* note 258.

267. See Nestle, *supra* note 186, at 2344.

underestimate the calorie content of their meals,²⁶⁸ which contributes to the obesity epidemic. As FDA Commissioner Margaret Hamburg, M.D., said in discussing the federal law, “[t]he menu labeling program will help Americans get the facts about food choices that are available to them... so they know what is in the food and can make healthier selections.”²⁶⁹ According to Hamburg, “[o]ne of the most important things we can do when it comes to the nation’s health is to provide simple basic information to the American people so they can make choices that are best for them and their family.”²⁷⁰ The federal menu-labeling law thus appears to target integrated interests: providing information to eliminate deception and equip consumers with the facts necessary to make more healthful choices, which may curb obesity and improve public health. It is this combined interest that one should analyze in determining whether the federal law is reasonably related to a legitimate government interest.

This combined government interest is legitimate.²⁷¹ Indeed, “[p]rotection of the health and safety of the public is a paramount

268. See *supra* Part III.D.2.; see also Nestle, *supra* note 186, at 2345 (“Almost everyone underestimates the number of calories in away-from-home foods, especially when portions are large or the foods are promoted as healthful.”). Consumers generally do not realize that larger portions have more calories. See Nestle, *supra* note 186, at 2345. “Many people find it difficult to believe that any food contains more than 200 or 300 kcal.” *Id.*

269. Press Release, FDA, FDA Releases Guidance on Federal Menu Labeling Requirements (Aug. 24, 2010), <http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm223880.htm>.

270. *Id.*

271. Cf., e.g., *Romer v. Evans*, 517 U.S. 620, 632 (1996) (citing cases where health and safety provided legitimate government interests); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 664 (1985) (Brennan, Marshall, JJ., concurring) (describing government’s interest in preventing deception as legitimate); *Hodel v. Indiana*, 452 U.S. 314, 327–29 (1981) (noting that protecting public health and safety is a legitimate government interest for Congress); *United States v. Ambert*, 561 F.3d 1202, 1209 (11th Cir. 2009) (noting that protecting public from danger is legitimate public interest for federal statute); *Abigail Alliance for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695, 713 (D.C. Cir. 2007) (noting that the “FDA’s policy of limiting access to investigational drugs is rationally related to the legitimate state interest of protecting patients, including the terminally ill, from potentially unsafe drugs with unknown therapeutic effects”); *Rem v. U.S. Bureau of Prisons*, 320 F.3d 791, 795 (8th Cir. 2003) (using protecting public safety as legitimate governmental interest); *Joel v. City of Orlando*, 232 F.3d 1353, 1358 (11th Cir. 2000) (describing public health as a legitimate government

governmental interest.”²⁷² Because the menu-labeling law aims to eliminate deception to promote public health and safety, it furthers a legitimate interest and should survive this aspect of review.

C. The Law is Reasonably Related to the Government's Interest

The means the government has chosen to accomplish its interest, requiring that restaurants post calorie information on their menus and menu boards, is reasonably related to the government's legitimate interest of informing consumers to eliminate deception and equip them with information necessary to make more healthful choices, to improve public health by curbing obesity. Because the federal menu-labeling law is reasonably related to the government's legitimate objective, the law should survive *Zauderer*.

Though the preliminary results for mandatory menu-labeling in general are mixed,²⁷³ “[m]uch evidence suggests that there is a potential value in posting calorie counts.”²⁷⁴ Research has revealed great public interest in accessing and using this information.²⁷⁵ Some preliminary studies have found that menu labeling, especially when accompanied by a statement regarding the recommended total daily caloric intake—which

interest); *United States v. Baker*, 197 F.3d 211, 216 (6th Cir. 1999) (characterizing Congress's interest in increasing safety by curtailing domestic violence as legitimate); *cf. Encyclopedia Britannica, Inc. v. F.T.C.*, 605 F.2d 964, 973 (7th Cir. 1979) (noting that preventing consumer deception is a legitimate government interest).

272. *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 300 (1981); *see also supra* note 241.

273. *Banker, supra* note 15, at 911.

274. *Nestle, supra* note 186, at 2344.

275. *Id.*

the federal law contains²⁷⁶—leads to reductions in the calories consumers purchased.²⁷⁷

Other studies suggest menu labeling may not alter consumer behavior.²⁷⁸ However, as commentator Michelle Banker noted, “these studies analyze a menu-labeling initiative still in its infancy,” and “supplementary nutrition education programs must first have an opportunity to take effect before researchers can obtain accurate evaluations of menu-labeling laws.”²⁷⁹ Further, there is evidence

276. Some may argue that the federal menu-labeling law may mandate posting calorie counts, but it should not require posting the recommended daily calorie intake. But this provision is important to provide context for calorie information for individual menu offerings and is thus an important part of why the law is reasonably related to the government’s interest in reducing deception and improving public health. *See supra* notes 49 and 217.

277. Nestle, *supra* note 186, at 2344; *see also* CALIFORNIA CENTER FOR PUBLIC HEALTH ADVOCACY, *supra* note 190; Auldridge, *supra* note 32. Other studies contradict this, concluding that posting calories had no effect or may even encourage some, like young men, to eat more. Nestle, *supra* note 186, at 2344; *see also* Auldridge, *supra* note 32. Given the forms of some of the studies, these contradictory results are not easily interpreted. *See* Nestle, *supra* note 186, at 2344. In general, however, the studies suggest “that as time passes customers will become more familiar with calorie postings and will be more likely to use calorie content to inform their orders.” Auldridge, *supra* note 32. Time is needed to see the results borne out. Though the effect on consumers remains to be seen, at least some restaurants have already altered their behavior in apparent response to menu-labeling requirements. *Id.* For example, “Starbucks has changed its default milk to 2% (from whole milk) and McDonald’s recently reduced the size of a standard serving of fries by .7 ounces or 70 calories.” *Id.*

278. *See* Banker, *supra* note 15 at 911–13. For example, a recent study concluded that patrons of Washington chain TacoTime were just as likely to purchase caloric meals when menu labeling was present as when it was absent. *See* Madison Park, *Customers Pay Little Heed to Calories on Menus*, CNN HEALTH, (Jan. 18, 2011, 9:34 AM), <http://pagingdrgupta.blogs.cnn.com/2011/01/18/customers-pay-little-heed-to-calories-on-menus/?hpt=C2>. Of course, this study only considered data from patrons of one specific, fast-food, chain restaurant, and patrons who choose TacoTime may not represent the population in general. Perhaps they care less about healthy eating, which is why they visited a fast-food Mexican restaurant in the first place.

279. *See* Banker, *supra* note 15 at 911.

suggesting that menu-labeling laws have caused restaurants to reduce calorie content in menu offerings, though this has also been disputed.²⁸⁰

Data obtained by other localities for their menu-labeling efforts provides information on the effectiveness of menu-labeling laws in general, which is useful for predicting the likely success of the federal effort. The Los Angeles County Public Health Department's 2008 report on menu labeling "project[ed] that such labeling would prevent 38.9% of the annual weight gain in the county."²⁸¹ Another analysis by the "University of California's Center for Weight and Health shows that providing calorie information on menu boards could help Californians avoid more than two pounds of weight gain per year and allow California as a whole to drop millions of pounds annually."²⁸²

The New York City Department of Health similarly projected success for menu labeling.²⁸³ It estimated that menu labeling in New York City "will prevent at least 30,000 new cases of diabetes over the next five years."²⁸⁴ It also estimated that New York's menu-labeling law has resulted in a reduction in the calorie content of menu items by around ten percent.²⁸⁵ The Department of Health's research shows that industry practices for sharing nutritional information are "woefully inadequate," but when patrons "see calorie content prior to ordering," they "choose meals with fewer calories than patrons who do not see calorie information."²⁸⁶

280. *See id.* at 913–14; *see also supra* note 277 (providing studies in support of the proposition that menu-labeling causes restaurants to offer meals with lower calorie counts).

281. CALIFORNIA CENTER FOR PUBLIC HEALTH ADVOCACY, *supra* note 190.

282. *See id.* These reports may be based on labeling in accordance with California's law, which goes further than the federal law. *See id.* It requires posting calorie, saturated fat, carbohydrate, and sodium information at points of purchase. *Id.* Though these reports may be based on California's more informative law, the results still suggest that posting nutritional information is likely to lead to consumers making smarter choices.

283. *See id.*

284. *See id.*

285. Banker, *supra* note 15, at 913–14.

286. CALIFORNIA CENTER FOR PUBLIC HEALTH ADVOCACY, *supra* note 190. *But see* Nestle, *supra* note 186, at 2345 (noting that one study analyzing New York's menu-labeling law found that consumers purchased the same foods with menu labeling as others did without it, but explaining that "[t]his result might be expected,

Though it may be difficult to predict with sharp accuracy the effect the federal menu-labeling law will have on improving consumers' restaurant choices, such accuracy should not be necessary. "Sound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable."²⁸⁷

Some may argue that the law is not reasonably related to the government's legitimate interest. They may maintain that there are more effective options for improving consumers' health via restaurant meals. For example, Congress might pass a law requiring that restaurants reduce the calorie content of their meals or alter the way they market their products.²⁸⁸ But, as with rational basis review, the decision of what means would best address the government's interest should generally be left to Congress.²⁸⁹

Others might argue that there are alternatives that would accomplish the government's goal while infringing less on commercial speakers' constitutional rights. Civil libertarians, for instance, have maintained that menu labeling is unnecessary in light of other options for providing nutritional information that restaurants may volitionally utilize.²⁹⁰ For example, a law could simply mandate making calorie information available while not requiring that restaurants post it on menus and menu boards.²⁹¹

But a law need not be the least restrictive means to survive *Zauderer*.²⁹² Moreover, there is evidence suggesting that posting calorie

since these outlets were located in areas with little choice in restaurants and where residents might be likely to seek low-cost foods that are high in calories").

287. *Turner Broad. Sys., Inc. v. FCC.*, 512 U.S. 622, 665 (1994) (plurality opinion).

288. Of course these options would bring their own constitutional questions.

289. "Courts reviewing for a rational basis must accept a legislature's generalizations even when there is an imperfect fit between means and ends; 'mathematical nicety' is not required." *Taylor v. Rancho Santa Barbara*, 206 F.3d 932, 935 (9th Cir. 2000) (quoting *Heller v. Doe*, 509 U.S. 312, 321 (1993)); *City of Chicago v. Shalala*, 189 F.3d 598, 606 (7th Cir. 1999).

290. See *Banker*, *supra* note 15, at 919.

291. "[A]bout half of restaurant chains [already] provide calorie information but put it in places where it is unlikely to be seen." *Nestle*, *supra* note 186, at 2344.

292. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651–52 n.14 (1985); *cf. Heller v. Doe ex rel. Doe*, 509 U.S. 312, 330 (1993) (noting that

information where customers will actually notice it while ordering is more effective than tucking it away somewhere, which is what restaurants tend to do.²⁹³ Furthermore, it is not even clear this alternative would intrude less on commercial speakers' rights because it would still arguably compel them to speak (assuming they did not want to make calorie information available at all).

Still others may argue that calorie postings may not even be accurate.²⁹⁴ According to one source, the accuracy of calorie postings is currently up for debate.²⁹⁵ A recent Tufts University study suggests that menus may list calorie amounts that are as much as eighteen percent less than the true amount.²⁹⁶ "Ongoing research into the effectiveness of calorie listings continues to find points on both sides of the issue."²⁹⁷

Ongoing research should consider that the federal menu-labeling law requires that a restaurant have a "reasonable basis for its nutrient content disclosures, including nutrient databases, cookbooks, laboratory

least-restrictive alternatives are irrelevant in rational-basis review because government is not required to have chosen least restrictive means to accomplish its legislative ends); *Fla. Bar v. Went for It, Inc.*, 515 U.S. 618, 632 (1995) (applying the more rigorous *Central Hudson* test and noting that "the 'least restrictive means' test has no role in the commercial speech context"); *Chambers v. Stengel*, 256 F.3d 397, 404 (6th Cir. 2001); *Cornerstone Christian Schs. v. Univ. Interscholastic League*, 563 F.3d 127, 139–40 (5th Cir. 2009) (applying rational basis review in the Equal Protection context and noting that least restrictive alternative need not be chosen). *But see* *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n.13 (1993) ("A [commercial speech] regulation need not be 'absolutely the least severe that will achieve the desired end,' but if there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the fit between ends and means is reasonable.") (quoting *Bd. of Trustees v. Fox*, 492 U.S. 469, 480 (1989)) (citation omitted).

293. *See* Nestle, *supra* note 186, at 2344; *see also* CALIFORNIA CENTER FOR PUBLIC HEALTH ADVOCACY, *supra* note 190 (noting that New York City's research shows that "current industry disclosure practices, such as posting information online, on tray liners, or in brochures, are woefully inadequate: 95% of New York City diners did not see nutrition information provided in this way").

294. *See* Auldridge, *supra* note 32.

295. *Id.*

296. *Id.*

297. *Id.*

analyses, and other reasonable means.”²⁹⁸ In other words, though the law does not require perfection, it does require calorie postings that are at least reasonable approximations of the actual calorie content of items offered for sale. Though this calorie information may not be perfect, that it is a reasonable estimate should be sufficient for *Zauderer* and its requirement of reasonableness. Providing a reasonable estimate of calories in restaurant meals is far better than offering no information.

Another argument one might offer is that the law is under-inclusive. For instance, it only requires posting calorie information but does not require posting other information relevant to healthful eating, like fat and saturated fat. Also, it only applies to restaurants with twenty or more locations,²⁹⁹ and this exempts many restaurants—including, mom-and-pop establishments serving fattening fare across the country.³⁰⁰ But a law need not tackle all issues in its attempt to ameliorate some.³⁰¹

298. See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 4205(b), 124 Stat. 119, 574 (2010)(to be codified as amended at 21 U.S.C. § 343(q)(5); see also Nutrition Labeling of Restaurant Food, 21 C.F.R. § 101.10 (2009) (noting that nutrition labels of restaurant foods can be determined by nutrient data bases, cookbooks, or by other reasonable means).

299. Patient Protection and Affordable Care Act, § 4205(b), 124 Stat. at 574.

300. Commentator Michelle Banker has argued that this exemption actually renders the law less pernicious. See Banker, *supra* note 15, at 919. Critics of menu labeling maintain that it stifles restaurants’ creativity by restricting recipe development and limiting menu changes, but Banker argues that concerns about creativity are more appropriate in the context of small chains or mom-and-pop establishments, and the federal law does not cover these. See *id.* at 919.

301. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651–52 n.14 (1985); cf. *Preseault v. ICC*, 494 U.S. 1, 18–19 (1990) (noting that the Court is not at liberty under rational-basis review to hold laws invalid “merely because more Draconian measures,” such as prohibiting all of a certain type of conduct, advance more completely the government’s purpose and “[t]he process of legislating often involves tradeoffs, compromises, and imperfect solutions, and [the Court’s] ability to imagine ways of redesigning the statute to advance one of Congress’ ends does not render it irrational”); *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 489 (1955); *Dandridge v. Williams*, 397 U.S. 471, 486–87 (1970) (“But the Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all.”). As the Court noted in *Williamson* upon consideration of an Equal Protection challenge based on a law subjecting only one group to its regulations while exempting others:

The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field

“Moreover, fast-food and restaurant chains constitute approximately 75 percent of total restaurant visits.”³⁰² Providing calorie information for restaurants consumers visit most frequently is an important step in the right direction, and one that Congress can take without simultaneously taking any of many other steps.³⁰³

Despite the many arguments some lodge against the federal menu-labeling law, it should withstand constitutional scrutiny under *Zauderer*. The federal government’s law is a reasonable means to address its legitimate objective.

V. CONCLUSION

Like New York’s version, the federal menu-labeling law should withstand First Amendment scrutiny. *Zauderer* supplies the appropriate test for scrutinizing this law because the law mandates a factual disclosure and does not restrict commercial speech or compel espousal of opinions or viewpoints. The government’s interest in protecting public health by curbing obesity is an appropriate interest under *Zauderer* both on its face and because it is intertwined with an interest in preventing consumer deception by providing information to enable consumers to make healthy choices.

The menu-labeling law should survive *Zauderer*’s test. The government’s objective, to eliminate consumer deception and foster

may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. *Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others.*

Williamson, 348 U.S. at 489 (emphasis added) (citations omitted).

302. See Banker, *supra* note 15, at 901 (citing a source explaining this point and further noting that “major restaurant chains” account for approximately half the restaurant visits).

303. Moreover, the law enables the Secretary—if he determines that additional nutritional information should be disclosed to provide information “to assist consumers in maintaining healthy dietary practices,”—to require, by regulation, that restaurants provide such information in the written materials that the law requires be available to consumers. Patient Protection and Affordable Care Act § 4205(b), 124 Stat. 119 at 575.

healthier eating at restaurants to address obesity, is a legitimate government interest. The menu-labeling law, which provides calorie information at points of sale, is reasonably related to that legitimate interest. The federal menu-labeling law should therefore pass *Zauderer* and First Amendment scrutiny. The skinny on the federal menu-labeling law is that it is an acceptable means to shrink America's waistline.

